UNITED
NATIONS

S

Security Council

Distr.
GENERAL

S/AC.26/2001/21
28 September 2001

Original: ENGLISH

UNITED NATIONS
COMPENSATION COMMISSION
GOVERNING COUNCIL

REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING THE TWENTY-FIRST INSTALMENT OF "E3" CLAIMS

GE.01-64959
01-71689

CONTENTS

	Paragraphs	Page
Introduction	1 - 4	7
I. PROCEDURAL HISTORY	5 - 10	7
A. The procedural history of the claims in the twenty-first instalment	5 - 8	7
B. The claimants	9 - 10	8
II. GEOTÉCNICA SA	11 - 61	10
A. Contract losses	13 - 19	10
1. Facts and contentions	13 - 16	10
2. Analysis and valuation	17 - 18	11
3. Recommendation	19	11
B. Business transaction or course of dealing	20 - 25	11
1. Facts and contentions	20 - 23	11
2. Analysis and valuation	24	12
3. Recommendation	25	12
C. Loss of profits	26 - 37	12
1. Facts and contentions	26 - 31	12
2. Analysis and valuation	32 - 36	12
3. Recommendation	37	13
D. Loss of tangible property	38 - 45	13
1. Facts and contentions	38 - 41	13
2. Analysis and valuation	42 - 44	14
3. Recommendation	45	14
E. Payment or relief to others	46 - 53	14
1. Facts and contentions	46 - 49	14
2. Analysis and valuation	50 - 52	15
3. Recommendation	53	15
F. Financial losses	54 - 60	15
1. Facts and contentions	54 - 57	15
2. Analysis and valuation	58 - 59	16
3. Recommendation	60	16
G. Summary of recommended compensation for Geotécnica	61	16
III. GEOTEHNIKA	62	17
IV. CHARILAOS APOSTOLIDIS & CO. LTD.	63 - 89	18
A. Contract losses	65 - 71	18
1. Facts and contentions	65 - 67	18

2. Analysis and valuation ..... 68 - 70 18
3. Recommendation 71 19
B. Business transaction or course of dealing ..... 72 - 77 19
1. Facts and contentions ..... 72 - 74 19
2. Analysis and valuation ..... 75 - 76 19
3. Recommendation 77 20
C. Loss of profits/overhead ..... 78 - 81 20
1. Facts and contentions ..... 78 - 79 20
2. Analysis and valuation 80 20
3. Recommendation 81 20
D. Loss of tangible property ..... 82 - 88 20
1. Facts and contentions ..... 82 - 83 20
2. Analysis and valuation ..... 84 - 87 21
3. Recommendation 88 21
E. Summary of recommended compensation for Charilaos 89 21

V. ED ZÜBLIN AG (CONTRACT CLAIM) ..... 90 - 105 22
A. Contract losses ..... 92 - 99 22
1. Facts and contentions ..... 92 - 96 22
2. Analysis and valuation ..... 97 - 98 23
3. Recommendation 99 23
B. Subsidiary motion ..... 100 - 104 23
1. Facts and contentions ..... 100 - 102 23
2. Analysis and valuation 103 23
3. Recommendation 104 24
C. Summary of recommended compensation for Ed Züblin 105 24

VI. ED ZÜBLIN AG (BANK ACCOUNT CLAIM) ..... 106 - 116 25
A. Financial losses ..... 109 - 115 25
1. Facts and contentions ..... 109 - 112 25
2. Analysis and valuation ..... 113 - 114 25
3. Recommendation 115 26
B. Summary of recommended compensation for Ed Züblin 116 26

VII. SCHEU & WIRTH AG ..... 117 - 124 27
A. Contract losses ..... 120 - 123 27
1. Facts and contentions ..... 120 - 121 27
2. Analysis and valuation 122 27
3. Recommendation 123 28
B. Summary of recommended compensation for Scheu & Wirth 124 28

VIII. THAMATH INTERNATIONAL ..... 125 - 147 29
A. Loss of profits ..... 128 - 135 29
1. Facts and contentions ..... 128 - 132 29
2. Analysis and valuation ..... 133 - 134 30
3. Recommendation 135 30
B. Loss of tangible property ..... 136 - 139 30
1. Facts and contentions 136 30
2. Analysis and valuation ..... 137 - 138 30
3. Recommendation 139 31
C. Payment or relief to others ..... 140 - 146 31
1. Facts and contentions ..... 140 - 143 31
2. Analysis and valuation ..... 144 - 145 31
3. Recommendation 146 32
D. Summary of recommended compensation for Thamath 147 32

IX. ENKA INSAAT VE SANAYI, A.S. ..... 148 - 189 33
A. Contract losses ..... 151 - 179 33
1. Facts and contentions 151 33
2. Analysis and valuation ..... 152 - 178 33
3. Recommendation 179 37
B. Loss of tangible property ..... 180 - 188 37
1. Facts and contentions ..... 180 - 185 37
2. Analysis and valuation ..... 186 - 187 38
3. Recommendation 188 39
C. Summary of recommended compensation for Enka 189 39

X. CONTRACTORS 600 LIMITED ..... 190 - 259 40
A. Contract losses ..... 193 - 208 40
1. Facts and contentions ..... 193 - 196 40
2. Analysis and valuation ..... 197 - 207 41
3. Recommendation 208 42
B. Loss of tangible property ..... 209 - 220 42
1. Facts and contentions ..... 209 - 213 42
2. Analysis and valuation ..... 214 - 219 43
3. Recommendation 220 43
C. Payment or relief to others ..... 221 - 237 43
1. Facts and contentions ..... 221 - 230 43
2. Analysis and valuation ..... 231 - 236 45
3. Recommendation 237 46
D. Financial losses ..... 238 - 258 46
1. Facts and contentions ..... 238 - 247 46
2. Analysis and valuation ..... 248 - 257 47

3. Recommendation 258 48
E. Summary of recommended compensation for Contractors 600 ..... 259 49

XI. JOHN LAING INTERNATIONAL ..... 260 - 288 50
A. Contract losses ..... 263 - 282 50
1. Facts and contentions ..... 263 - 272 50
2. Analysis and valuation 273- 281 52
3. Recommendation 282 53
B. Loss of profits ..... 283 - 287 53
1. Facts and contentions ..... 283 - 284 53
2. Analysis and valuation ..... 285 - 286 54
3. Recommendation 287 54
C. Summary of recommended compensation for John Laing 288 54

XII. TRIPOD ENGINEERING CO. LTD. ..... 289 - 328 55
A. Contract losses ..... 291 - 324 55
1. Facts and contentions/analysis and valuation ..... 291 - 323 55
2. Recommendation 324 60
B. Loss of tangible property ..... 325 - 327 60
1. Facts and contentions 325 60
2. Analysis and valuation 326 60
3. Recommendation 327 60
C. Summary of recommended compensation for Tripod 328 60

XIII. SUMMARY OF RECOMMENDED COMPENSATION BY CLAIMANT 61

Annex

Summary of general propositions 62

List of tables

Page

1. Geotécnica's claim 10
2. Recommended compensation for Geotécnica 16
3. Charilaos's claim 18
4. Recommended compensation for Charilaos 21
5. Ed Züblin's claim (contract claim) 22
6. Recommended compensation for Ed Züblin (contract claim) 24
7. Ed Züblin's claim (bank account claim) 25
8. Recommended compensation for Ed Züblin (bank account claim) 26
9. Scheu & Wirth's claim 27
10. Recommended compensation for Scheu & Wirth 28
11. Thamath's claim 29
12. Recommended compensation for Thamath 32
13. Enka's claim 33
14. Recommended compensation for Enka 39
15. Contractors 600's claim 40
16. Contractors 600's claim for payment or relief to others 44
17. Contractors 600's claim for financial losses 46
18. Recommended compensation for Contractors 600 49
19. John Laing's claim 50
20. Recommended compensation for John Laing 54
21. Tripod's claim 55
22. Recommended compensation for Tripod 60
23. Recommended compensation for the twenty-first instalment 61

Introduction

1. The Governing Council of the United Nations Compensation Commission (the "Commission") appointed the present Panel of Commissioners (the "Panel"), composed of Messrs. John Tackaberry (Chairman), Pierre Genton and Vinayak Pradhan, at its twenty-eighth session in June 1998, to review construction and engineering claims filed with the Commission on behalf of corporations and other legal entities in accordance with the relevant Security Council resolutions, the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the "Rules") and other Governing Council decisions. This report contains the recommendations to the Governing Council by the Panel, pursuant to article 38(e) of the Rules, concerning the eleven claims included in the twenty-first instalment. Each of the claimants seeks compensation for loss, damage or injury allegedly arising out of Iraq's 2 August 1990 invasion and subsequent occupation of Kuwait.

2. One of the claims, that of Geotehnika, filed with the Commission by the Government of the Republic of Croatia, was withdrawn during the proceedings. (See paragraph 62, infra).

3. Based on its review of the claims presented to it to date and the findings of other panels of Commissioners contained in their reports and recommendations, as approved by the Governing Council, this Panel has set out some general propositions concerning construction and engineering claims filed on behalf of corporations (the "'E3' Claims"). The general propositions are contained in annex I entitled "Summary of General Propositions" (the "Summary"). The Summary forms part of, and is intended to be read together with, this report.

4. Each of the claimants included in the twenty-first instalment had the opportunity to provide the Panel with information and documentation concerning the claims. The Panel has considered evidence from the claimants and the responses of Governments, including the Government of Iraq, to the reports of the Executive Secretary issued pursuant to article 16 of the Rules. The Panel has retained consultants with expertise in valuation and in construction and engineering. The Panel has taken note of certain findings by other panels of Commissioners, approved by the Governing Council, regarding the interpretation of relevant Security Council resolutions and Governing Council decisions. The Panel was mindful of its function to provide an element of due process in the review of claims filed with the Commission. Finally, the Panel has further amplified both procedural and substantive aspects of the process of formulating recommendations in the Summary to its consideration of the individual claims.

I. PROCEDURAL HISTORY

A. The procedural history of the claims in the twenty-first instalment

5. A summary of the procedural history of the 'E3' Claims is set down in paragraphs 10 to 18 of the Summary.

6. On 28 February 2001, the Panel issued a procedural order relating to the claims included in the twenty-first instalment. None of the claims presented complex issues, voluminous documentation or extraordinary losses that would require the Panel to classify any of them as "unusually large or

complex" within the meaning of article 38(d) of the Rules. The Panel thus had an obligation to complete its review of the claims within 180 days of the date of the procedural order, pursuant to article 38(c) of the Rules.

7. In view of the review period and the available information and documentation, the Panel determined that it was able to evaluate the claims without additional information or documents from the Government of Iraq. Nonetheless, due process, the provision of which is the responsibility of the Panel, has been achieved by, among other things, the insistence of the Panel on the observance by claimants of the article 35(3) requirement for sufficient documentary and other appropriate evidence.

8. In drafting this report, the Panel has not included specific citations from restricted or non-public documents that were produced or made available to it for the completion of its work.

B. The claimants

9. This report contains the Panel's findings with respect to the following ten claims for losses allegedly caused by Iraq's invasion and occupation of Kuwait:

(a) Geotécnica SA, a corporation organised under the laws of Brazil, which seeks compensation in the total amount of 6,291,263 United States dollars (USD);

(b) Charilaos Apostolidis & Co. Ltd., a corporation organised under the laws of Cyprus, which seeks compensation in the total amount of USD 8,108,211;

(c) Ed Züblin AG (contract claim), a corporation organised under the laws of Germany, which seeks compensation in the total amount of USD 925,529;

(d) Ed Züblin AG (bank account claim), a corporation organised under the laws of Germany, which seeks compensation in the total amount of USD 4,400,419;

(e) Scheu & Wirth AG, a corporation organised under the laws of Germany, which seeks compensation in the total amount of USD 369,000;

(f) Thamath International, a corporation organised under the laws of India, which seeks compensation in the total amount of USD 749,239;

(g) Enka Insaat Ve Sanayi, A.S., a corporation organised under the laws of Turkey, which seeks compensation in the total amount of USD 8,945,701;

(h) Contractors 600 Limited, a corporation organised under the laws of the United Kingdom, which seeks compensation in the total amount of USD 3,970,236;

(i) John Laing International, a corporation organised under the laws of the United Kingdom, which seeks compensation in the total amount of USD 9,590,137; and

(j) Tripod Engineering Co. Ltd., a corporation organised under the laws of the United Kingdom, which seeks compensation in the total amount of USD 9,518,280.

10. These amounts claimed in United States dollars represent the alleged loss amounts after correction for applicable exchange rates as described in paragraphs 55 to 57 of the Summary.

II. GEOTÉCNICA SA

11. Geotécnica SA ("Geotécnica") is a corporation existing under the laws of Brazil which carried out construction and engineering works in Iraq. It alleges that the performance of its operations in Iraq was interrupted by Iraq's invasion and occupation of Kuwait.

12. Geotécnica seeks compensation in the amount of USD 6,291,263 (112,249 Iraqi dinars (IQD) and USD 5,930,334, converted by the claimant to USD 6,290,528) for contract losses, loss related to business transaction or course of dealing, loss of profits, loss of tangible property, payment or relief to others, and financial losses.

Table 1. Geotécnica's claim

Claim element	Claim amount (USD)
Contract losses	360,929
Loss related to business transaction or course of dealing	609,400
Loss of profits	3,924,153
Loss of tangible property	1,280,959
Payment or relief to others	74,535
Financial losses	41,287
Total	6,291,263

A. Contract losses

1. Facts and contentions

13. Geotécnica seeks compensation in the total amount of USD 360,929 (IQD 112,249, converted by the claimant to USD 360,194) for contract losses. The claim includes (a) the amount of USD 124,392 due on "final certificate" (IQD 38,686, converted by the claimant to USD 124,140) and (b) the amount of USD 236,537 in retention monies (IQD 73,563, converted by the claimant to USD 236,054).

14. On 12 August 1985, Geotécnica entered into a contract with the State Organisation for Dams ("SOD"), an Iraqi state entity, for the stabilisation and retention of slopes on the banks of the Derbendi-Khan Dam reservoir (the "Derbendi-Khan Dam contract"). The total value of the contract was IQD 2,763,905.

15. The site works were completed on 9 August 1989. Geotécnica was contractually bound to remain on site for a further 12 months for the maintenance period. However, Geotécnica asserts that it

was unable to complete the maintenance period and finalise the contract because Iraq's invasion and occupation of Kuwait forced it to abandon its operations in Iraq.

16. Geotécnica asserts that it was not paid the "final certificate" (for work performed in August 1989) and 50 per cent of the contractual retention, because the maintenance period was never completed.

2. Analysis and valuation

17. In respect of loss item (a), the evidence provided by Geotécnica indicates that the work was performed in August 1989. The claim is therefore outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation for this amount.

18. In respect of loss item (b), the retention monies, the evidence indicates that the debt was due and owing after 2 May 1990 and is therefore within the jurisdiction of the Commission. The Panel finds that the maintenance period was due to expire on 9 August 1990. There is no indication that the contract would not have been completed satisfactorily. Geotécnica has provided sufficient evidence in support of its claim including the contract, the provisional acceptance certificate, and correspondence from the Ministry of Agriculture and Irrigation, Iraq which acknowledges the amounts owed. The Panel recommends compensation in the amount of USD 236,537 for retention monies.

3. Recommendation

19. The Panel recommends compensation in the amount of USD 236,537 for contract losses.

B. Business transaction or course of dealing

1. Facts and contentions

20. Geotécnica seeks compensation in the amount of USD 609,400 for business development costs.

21. Geotécnica asserts that while carrying on business in Iraq it conducted a continuous business development programme to identify, appraise and tender for new projects. The programme was coordinated by the contracts director in Rio de Janeiro and involved the Iraqi branch manager and staff, and consultants.

22. Geotécnica asserts that it is not possible to allocate precise costs to each tender, but according to previous experience and construction industry parameters, it estimates tender costs as a percentage of the value of the contract bids. For example, the business development costs of a bid with a value of between USD 0 and USD 50,000 are estimated at 7 per cent.

23. Geotécnica asserts that it incurred business development costs to the value of USD 609,400 in relation to seven tenders issued between 1986 and 1990. It states that due to Iraq's invasion and occupation of Kuwait it will never be able to recover the costs.

2. Analysis and valuation

24. The Panel finds that the business development costs are not directly causally related to Iraq's invasion and occupation of Kuwait. Such costs constitute a normal cost to the contractor who takes a risk of not obtaining the contracts for which it bids.

3. Recommendation

25. The Panel recommends no compensation for loss related to business transaction or course of dealing.

C. Loss of profits

1. Facts and contentions

26. Geotécnica seeks compensation in the amount of USD 3,924,153 for loss of profits.

27. In 1984, Geotécnica submitted a proposal to SOD for the execution of Contract 12A, which involved similar work to the Derbendi-Khan Dam contract (see: paragraph 14, supra). SOD approved the proposal and on 1 December 1986 issued to Geotécnica a "letter of contract award" valued at IQD 4,100,000.

28. On 11 November 1987, Banco do Brasil agreed to provide finance for the contract pursuant to a credit agreement. Geotécnica also supplied a performance bond to the value of IQD 215,480. However, Geotécnica asserts that at this time the war between Iran and Iraq postponed the signing of the credit agreement.

29. After the cessation of the war between Iran and Iraq, by letter of 1 August 1989, SOD confirmed the award of contract. On 15 June 1990, after negotiations, Banco do Brasil revalidated the credit agreement.

30. However, Geotécnica asserts that the works relating to the contract were not begun due to Iraq's invasion and occupation of Kuwait.

31. Geotécnica assesses its lost profits at 30 per cent of the contract value. This assessment is based on the final cost estimate performed for the contract, with adjustments to reflect Geotécnica's assertion that it would have used the same site installations, equipment and staff which it had just finished using on the Derbendi-Khan Dam contract.

2. Analysis and valuation

32. In support of its claim for loss of profits, Geotécnica relied on a contract proposal and bill of quantities dated 1984, correspondence from SOD to Geotécnica approving the proposal,

documentation relating to the credit agreement financed by Banco do Brasil, a contract budget prepared in 1990 for the purpose of supporting Geotécnica's claim before the Commission, group accounts for the years 1988–1990 showing a profit ranging from 3 per cent to 10 per cent, and a balance sheet dated 1986 for its Iraqi branch.

33. The Panel finds that Geotécnica has not substantiated its claim. The bill of quantities was prepared in 1984 almost six years before the contract was due to commence. The rates of inflation in both Iraq and Brazil between 1984 and 1990 raise serious doubt as to whether the contract would have been profitable if performed.

34. Geotécnica did not provide sufficient information to enable the Panel to determine whether the contract budget prepared by Geotécnica in 1990 is realistic as compared to the 1984 bill of quantities. The 1984 bill of quantities is listed in Iraqi dinars while the 1990 budget is in United States dollars. The bill of quantities did not specify the profit margin built into the amounts quoted. The Panel found that the matching of the budget to the bill of quantities was not an exercise which could be practicably undertaken.

35. The group accounts for the years 1988–1990 contain no specific financial information relating to the branch in Iraq. The world-wide financial statement of a company has little or no bearing on the profitability of a single project unless there is apparent correlation between the performance of the project and that of the world-wide project.

36. The 1986 balance sheet is too far removed from the intended date of commencement of the contract to be meaningful in the assessment of any loss of profits.

3. Recommendation

37. The Panel recommends no compensation for loss of profits.

D. Loss of tangible property

1. Facts and contentions

38. Geotécnica seeks compensation in the amount of USD 1,280,959 for loss of tangible property.

39. Geotécnica asserts that it had various equipment, tools, accessories, electrical appliances and furniture in Iraq in order to carry out its contracts. At the time of Iraq's invasion and occupation of Kuwait, part of the property was located at the Derbendi-Khan Dam contract site (see: paragraph 14, supra), and part was located at Geotecnica's branch office in Baghdad.

40. The property includes (a) equipment exported from Brazil to Iraq (26 items), (b) equipment transferred from another contract abroad (Peru) to Iraq (air compressor); (c) equipment purchased in Iraq prior to 1986 (caravans and containers, equipment, and office equipment); and (d) equipment purchased in Iraq after 1986 (air-compressor, toyota pick-up).

41. Geotécnica asserts that it was forced to abandon the property in Iraq when Iraq invaded Kuwait.

2. Analysis and valuation

42. The Panel finds that Geotécnica has substantiated its claim for loss items (a) equipment exported from Brazil to Iraq, (b) equipment transferred from Peru to Iraq, and (d) equipment purchased in Iraq after 1986. The evidence provided by Geotécnica shows that the property was either imported into Iraq or purchased in Iraq by Geotécnica, and the fact that the maintenance period on the Derbendi-Khan Dam contract was due to expire in August 1990 supports Geotécnica's assertion that the property was still in Iraq as at 2 August 1990. The evidence further indicates that Geotécnica demobilised its operations in Iraq after Iraq's invasion and occupation of Kuwait, leaving the property unguarded.

43. The Panel finds that Geotécnica has not substantiated its claim for loss item (c), property purchased in Iraq prior to 1986. The only evidence provided in relation to this claim was the 1986 balance sheet for the Iraqi branch. There is no evidence of ownership of the specific items of property or that the property continued to be in Iraq as at 2 August 1990.

44. The Panel finds that the value of loss items (a), (b) and (d), taking into account depreciation, is USD 426,782.

3. Recommendation

45. The Panel recommends compensation in the amount of is USD 426,782 for loss of tangible property.

E. Payment or relief to others

1. Facts and contentions

46. Geotécnica seeks compensation in the amount of USD 74,535 for payment or relief to others, including (a) demobilisation costs (USD 44,335), and (b) costs of rescission of employment contracts (USD 30,200).

47. Geotécnica states that due to Iraq's invasion and occupation of Kuwait it was forced to demobilise all of its staff engaged in Iraq and repatriate them to Brazil.

48. Loss item (a), demobilisation costs, includes air tickets for four employees, excess baggage, travel expenses, and salaries for four engineers for the time they were on stand-by (ranging from 42 days to 84 days).

49. In relation to loss item (b), the contract of one engineer was rescinded on 3 November 1990, and the contracts of three engineers were rescinded on 21 October 1990. Geotécnica asserts that upon rescission it paid each of the four engineers the balance of their monthly salary, the proportional part (i.e., from January to October 1990) of the thirteenth month element of their annual salary, and payments for their accrued holidays for 1989/1990.

2. Analysis and valuation

50. Geotécnica provided no evidence in support of its claim for payment or relief to others.

51. In its response to the article 34 notification, Geotécnica states that salary payments were made by receipts issued by the Iraqi branch and that it was unable to recover the files and expense controls after the war.

52. The Panel finds that in the absence of any evidence at all, for example affidavits or copies of passports of the employees, it is unable to recommend any compensation for payment or relief to others.

3. Recommendation

53. The Panel recommends no compensation for payment or relief to others.

F. Financial losses

1. Facts and contentions

54. Geotécnica seeks compensation in the amount of USD 41,287 for financial losses, including (a) charges incurred on performance bond for the Derbendi-Khan Dam contract (see: paragraph 14, supra) (USD 12,606) and (b) charges incurred on a performance bond for contract 12A (see: paragraph 27, supra) (USD 28,681).

55. In relation to loss item (a), Geotécnica states that on the signing of the Derbendi-Khan Dam contract, Geotécnica was obliged to submit a performance bond for the value of IQD 158,000 through the Banco do Brasil, with a counter guarantee issued by the Banco de Desenvolvimento do Estado do Rio de Janeiro ("BD Rio"). On 30 August 1988, with the closing of BD Rio, Geotécnica was obliged to submit another guarantee with the mortgage of equipment as collateral. Geotécnica was required to obtain insurance for this equipment.

56. The performance bond continued in force and insurance premiums were automatically deducted from Geotécnica's account on 9 August 1990; 25 February 1991; 13 January, 16 March, and 30 September 1992; and 26 March 1993. In March 1993, the insurance company finally agreed to suspend renewal of the insurance. Geotécnica alleges that it will be unable to recover these charges due to Iraq's invasion and occupation of Kuwait preventing completion of the contract.

57. In relation to loss item (b), Geotécnica states that on 12 November 1987, Banco do Brasil issued a performance bond in respect of the Derbendi-Khan Dam contract and Geotécnica continued paying the charges on the bond for a period of 30 months, until Banco do Brasil agreed to cancel the bond. Geotécnica alleges that it is unable to recover these charges due to Iraq's invasion and occupation of Kuwait preventing performance of the contract.

2. Analysis and valuation

58. In relation to loss item (a), the Panel finds that the charges paid by Geotécnica on 9 August 1990 were incurred directly due to Iraq's invasion and occupation of Kuwait. The charges incurred after this date were not directly due to the invasion but to Geotécnica's failure to prevent deduction of these charges (see in this context, paragraphs 85 to 94 of the Summary). The Panel recommends compensation in the amount of USD 4,862 for the charges paid on 9 August 1990.

59. In relation to loss item (b), the Panel finds that Geotécnica did not provide sufficient evidence to prove that the charges incurred on the performance bond for Contract 12A were incurred directly due to Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation in respect of these charges.

3. Recommendation

60. The Panel recommends compensation in the amount of USD 4,862 for financial losses.

G. Summary of recommended compensation for Geotécnica

Table 2. Recommended compensation for Geotécnica

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	360,929	236,537
Loss related to business transaction or course of dealing	609,400	nil
Loss of profits	3,924,153	nil
Loss of tangible property	1,280,959	426,782
Payment or relief to others	74,535	nil
Financial losses	41,287	4,862
Total	6,291,263	668,181

61. Based on its findings regarding Geotécnica's claim, the Panel recommends compensation in the amount of USD 668,181. The Panel finds the date of loss to be 2 August 1990.

III. GEOTEHNIKA

62. On 7 June 2001, the Commission received a notice of withdrawal of the claim by Geotehnika from the Permanent Mission of the Republic of Croatia. In the light of this communication, the Panel issued a procedural order on 19 June 2001, pursuant to article 42 of the Rules, acknowledging the withdrawal and terminating the Panel's proceedings with respect to the claim by Geotehnika.

IV. CHARILAOS APOSTOLIDIS & CO. LTD.

63. Charilaos Apostolidis & Co. Ltd. ("Charilaos") is a corporation existing under the laws of Cyprus which was involved in a number of projects in Iraq.

64. Charilaos seeks compensation in the amount of USD 8,108,211 (IQD 2,254,265 and USD 859,770) for contract losses, losses related to business transaction or course of dealing, loss of profits, and loss of tangible property.

Table 3. Charilaos's claim

Claim element	Claim amount (USD)
Contract losses	939,592
Losses related to business transaction or course of dealing	5,138,768
Loss of profits/overhead	45,016
Loss of tangible property	1,984,835
Total	8,108,211

A. Contract losses

1. Facts and contentions

65. Charilaos seeks compensation in the total amount of USD 939,592 (IQD 292,213) for contract losses. It appears that it performed contracts for a number of Iraqi entities and it claims that the following amounts remain outstanding: (a) amounts owed by the State Company for Building Contracts, Iraq (IQD 170,094); (b) amounts owed by the State Contracting Company for School Building, Iraq (IQD 46,592); (c) amounts owed by the Al-Mansoor Contracting Company, Iraq (IQD 5,739); (d) "remittances blocked at Central Bank" (IQD 11,356); and (e) customs deposit (IQD 58,432).

66. The evidence provided by Charilaos indicates that the contracts relating to loss items (a), (b), and (c) were completed at various dates in or before 1989.

67. Charilaos provided no further information about loss items (d) or (e).

2. Analysis and valuation

68. In relation to items (a), (b) and (c), the amounts owed by the three Iraqi entities, based on the evidence provided by Charilaos, the Panel finds that Charilaos performed the work for which it claims prior to 2 May 1990. The claims are therefore outside the jurisdiction of the Commission and are not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect

to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

69. In relation to item (d), "remittances blocked at Central Bank", Charilaos has not provided sufficient evidence that it incurred a loss or that any loss was directly caused by Iraq's invasion and occupation of Kuwait.

70. In relation to item (e), customs deposit, applying the approach taken with respect to customs deposits, as set out in paragraphs 141 to 144 of the Summary, the Panel is unable to recommend compensation.

3. Recommendation

71. The Panel recommends no compensation for contract losses.

B. Business transaction or course of dealing

1. Facts and contentions

72. Charilaos seeks compensation in the amount of USD 5,138,768 (IQD 1,598,157) for losses related to business transaction or course of dealing. Charilaos has not provided a detailed explanation of the claim. It appears that the claim is composed of two loss items: (a) amounts due on a contract dated circa 1984 for the University of Baghdad, phase 7 (IQD 1,250,000); and (b) an amount invested in a joint venture with "Alghanim and Assad Trading and Contracting WLL from Kuwait" for the same project (IQD 348,157).

73. In relation to loss item (a), Charilaos asserts that it completed a contract with the Government of Iraq for the University of Baghdad, Phase 7 in 1984. It states that due to the war between Iran and Iraq, the Government of Iraq refused to pay and Charilaos claimed damages for breach of contract. It brought arbitration proceedings in 1987 and states that the case remains pending. It asserts that the "Gulf War raised deliberate unlawful actions by officials and other Government Agents so to drop the case".

74. Charilaos provided no further information in relation to loss item (b).

2. Analysis and valuation

75. In relation to loss item (a), based on the limited evidence provided by Charilaos, the Panel finds that the University of Baghdad Phase 7 Project was completed in 1984. Even if Iraq's invasion and occupation of Kuwait did later affect subsequent arbitration proceedings, the Panel finds that the failure to obtain payment of any amounts due by the Government of Iraq on this project was not directly caused by Iraq's invasion and occupation of Kuwait but by preceding events. In any case, the Panel finds that Charilaos did not provide sufficient evidence to substantiate its claim.

76. In relation to loss item (b), according to the limited information provided by Charilaos, the Panel finds that amounts were invested in the joint venture between 1984 and 1988. This suggests that

the invested amounts were lost, not due to Iraq's invasion and occupation of Kuwait, but due to another pre-existing reason. In any case, Charilaos did not provide sufficient evidence to substantiate the claim.

3. Recommendation

77. The Panel recommends no compensation for losses related to business transaction or course of dealing.

C. Loss of profits/overhead

1. Facts and contentions

78. Charilaos seeks compensation in the amount of USD 45,016 (IQD 14,000) for the operating expenses of its Iraqi office for the period August to December 1990.

79. Charilaos does not assert how these losses were directly caused by Iraq's invasion and occupation of Kuwait.

2. Analysis and valuation

80. The Panel finds that the branch office expenses are to be regarded as part of Charilaos's overhead. Applying the approach taken with respect to head office and branch office expenses, as set out in paragraphs 120 to 124 of the Summary, the Panel is unable to recommend compensation.

3. Recommendation

81. The Panel recommends no compensation for loss of profits/overhead.

D. Loss of tangible property

1. Facts and contentions

82. Charilaos seeks compensation in the amount of USD 1,984,835 (IQD 349,895 and USD 859,770) for loss of tangible property. The claim includes (a) site camp accommodation including furniture and fittings (IQD 227,000), (b) plant and machinery (IQD 102,045), (c) transport means (IQD 20,850), (d) materials in transit (USD 40,338), (e) machinery (USD 619,432) and (f) transportation costs (USD 200,000).

83. Charilaos provided little detail of its claim. In relation to loss items (a), (b), and (c), it merely states that they were "lost due to the Gulf War". In relation to loss item (d), it states that the materials "were lost in Turkey due to the Gulf Crisis". In relation to loss item (e), it states that the machinery "remained in Iraq during the Gulf War. Despite our effort after the War to possess whatever has been left, the machinery has not yet been found". In relation to loss item (f), it states that machinery which was in Aqaba Port, Jordan, with a final destination to Iraq had to be transported to Cyprus for security reasons. The procedure allegedly cost USD 200,000.

2. Analysis and valuation

84. The Panel finds that Charilaos did not provide sufficient evidence to substantiate its claim. The only loss items of its claim in relation to which Charilaos provided any evidence were loss items (c) and (f).

85. In relation to loss item (c), materials in transit, Charilaos provided an invoice and a bill of lading which shows that the materials (metal doors with frames) were shipped to Iraq on 30 July 1990. However, it provided no evidence of what happened to the materials after that date. Accordingly, the Panel is unable to recommend compensation for this item.

86. In relation to loss item (f), Charilaos provided an invoice dated 17 January 1991 issued by Nakufreight Ltd. to Charilaos in the amount of 10,348 Pounds sterling (GBP) for the cost of freight. However, Charilaos provided no evidence to explain how these costs were incurred directly due to Iraq's invasion and occupation of Kuwait. Accordingly, the Panel is unable to recommend compensation for this item.

87. In view of the lack of evidence in relation to the remaining loss items of the claim, the Panel is unable to recommend compensation for loss of tangible property.

3. Recommendation

88. The Panel recommends no compensation for loss of tangible property.

E. Summary of recommended compensation for Charilaos

Table 4. Recommended compensation for Charilaos

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	939,592	nil
Loss related to business transaction or course of dealing	5,138,768	nil
Loss of profits/overhead	45,016	nil
Loss of tangible property	1,984,835	nil
Total	8,108,211	nil

89. Based on its findings regarding Charilaos's claim, the Panel recommends no compensation.

V. ED ZÜBLIN AG (CONTRACT CLAIM)

90. Ed Züblin AG ("Ed Züblin") is a corporation existing under the laws of Germany which had a construction contract with the State Contracting Company for Water and Sewerage Projects, Iraq ("SCCWSP").

91. In this report, the Panel considers two separate claims filed by Ed Züblin. The other claim is considered at paragraphs 106 to 116, infra. In this claim, Ed Züblin seeks compensation in the amount of USD 925,529 for contract losses and a subsidiary motion.

Table 5. Ed Züblin's claim

Claim element	Claim amount (USD)
Contract losses	278,573
Subsidiary motion	646,956
Total	925,529

A. Contract losses

1. Facts and contentions

92. Ed Züblin seeks compensation in the total amount of USD 278,573 (435,131 Deutsche Mark (DEM)) for contract losses.

93. On 23 February 1980, Ed Züblin entered into a contract with SCCWSP for the construction and maintenance of works relating to the Al-Thawra City Main-Sewer Contract ("Al-Thawra contract"). The contract works were completed in September 1984.

94. Ed Züblin asserts that in 1983, due to shortage of foreign exchange, SCCWSP asked Ed Züblin to arrange financing of the amounts of Deutsche Mark owed to Ed Züblin by SCCWSP for work performed in 1983. On 13 December 1983, SCCWSP entered into a loan agreement with Ausfuhrkredit-Gesellschaft mbH ("AKA") whereby AKA agreed to loan SCCWSP an amount of up to DEM 12,700,000 for the purpose of paying Ed Züblin the amounts due under the Al-Thawra contract.

95. AKA obtained insurance cover for 87.5 per cent of its claims under the loan agreement from the Federal Republic of Germany represented by Hermes. The remaining 12.5 per cent was covered by an export guarantee obtained from Ed Züblin.

96. Ed Züblin asserts that it was in close contact with SCCWSP with regard to payment of the outstanding amount, but negotiations were interrupted by Iraq's invasion and occupation of Kuwait. It alleges that its total loss is DEM 435,131, which includes the 12.5 per cent not covered by the Hermes guarantee, exchange rate losses and interest for the period 2 August 1990 to 31 December 1993.

2. Analysis and valuation

97. The Panel finds that Ed Züblin's claim for contract losses is well-documented. It provided copies of the loan agreement between Iraq and AKA dated 13 December 1983, prolongation agreements (of the loan agreement dated 13 December 1983), the exporter's guarantee issued by Ed Züblin in favour of AKA dated 9 December 1983, supplements to the exporter's guarantee, and correspondence between AKA and Ed Züblin dated November 1988 to December 1993.

98. However, the Panel finds that the work on the Al-Thawra contract was completed in September 1984. The payment arrangements made in 1983 had the effect that payments on the contract were still outstanding as at 2 May 1990. Applying the approach taken with respect to "contractual arrangements to defer payments", as set out in paragraphs 68 to 77 of the Summary, the Panel finds that as the contract was completed in 1983, the claims are outside the jurisdiction of the Commission and are not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

3. Recommendation

99. The Panel recommends no compensation for contract losses.

B. Subsidiary motion

1. Facts and contentions

100. As well as its claim for contract losses, Ed Züblin filed a "subsidiary motion" in the amount of USD 646,956 (DEM 1,010,545).

101. Ed Züblin states that AKA made a separate claim to the Commission for losses suffered by AKA arising out of the loan agreement between the Government of Iraq and AKA dated 13 December 1983. Although AKA was partially compensated for its losses by Ed Züblin, AKA and Ed Züblin entered into an agreement by which AKA would pursue all claims on its behalf, but on Ed Züblin's account. This was thought to be administratively easier.

102. In view of this arrangement, Ed Züblin files a "subsidiary motion" by which it seeks compensation in the amount of USD 646,956, but only if the AKA's claim to the Commission fails.

2. Analysis and valuation

103. On the question of subsidiary motions, the Panel agrees with the view expressed in the "Report and recommendations made by the Panel of Commissioners concerning the seventh instalment of 'E3' claims", namely that the Panel does not have jurisdiction over such contingent claims.

3. Recommendation

104. The Panel recommends no compensation for the subsidiary motion.

C. Summary of recommended compensation for Ed Züblin

Table 6. Recommended compensation for Ed Züblin

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	278,573	nil
Subsidiary motion	646,956	nil
Total	925,529	nil

105. Based on its findings regarding Ed Züblin's claim, the Panel recommends no compensation.

VI. ED ZÜBLIN AG (BANK ACCOUNT CLAIM)

106. Ed Züblin AG ("Ed Züblin") is a corporation existing under the laws of Germany which carried out construction work in Iraq.

107. In this report, the Panel considers two separate claims filed by Ed Züblin. The other claim is considered at paragraphs 90 to 105, supra. In this claim, it seeks compensation in the amount of USD 4,400,419 for loss of bank funds held with the Rasheed Bank, Iraq and interest.

108. The interest element is in the amount of USD 2,149,702. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Ed Züblin's claim for interest.

Table 7. Ed Züblin's claim

Claim element	Claim amount (USD)
Financial losses	2,250,717
Interest	2,149,702
Total	4,400,419

A. Financial losses

1. Facts and contentions

109. Ed Züblin seeks compensation in the total amount of USD 2,250,717 (IQD 699,973, converted by the claimant to DEM 4,374,832) for loss of bank funds held with the Rasheed Bank, Sa'doon Branch, Baghdad, Iraq.

110. Ed Züblin states that it established account no. 85 351 with Rasheed Bank in connection with a contract between the Iraq-German Joint Venture for the Construction of School Buildings and the Ministry of Housing and Construction, Iraq.

111. On 16 September 1993, Iraq issued Law No. 57, which had the effect of freezing the bank account. The balance of the account at this date was IQD 699,973.

112. Ed Züblin seeks compensation for this amount plus interest for the period 1 January 1990 to 30 November 2000 (see: table 7, supra).

2. Analysis and valuation

113. In support of its claim for the loss of the bank account, Ed Züblin provided a copy of the Iraqi legislation having the effect of freezing the bank account, a contract dated September 1980 between the Iraq-German Joint Venture for the Construction of School Buildings and the Ministry of Housing and Construction, Iraq, and a certificate by AKA setting out variable interest rates for its loans during the period starting from 1 January 1986.

114. However, applying the approach taken with respect to "funds in bank accounts in Iraq", as set out in paragraphs 135 to 139 of the Summary, the Panel is unable to recommend compensation. The evidence provided by Ed Züblin does not prove that Iraq was under a contractual or other specific duty to exchange the funds in the bank account for convertible currencies, or that Iraq had authorised the transfer of these converted funds out of Iraq.

3. Recommendation

115. The Panel recommends no compensation for financial losses.

B. Summary of recommended compensation for Ed Züblin

Table 8. Recommended compensation for Ed Züblin

Claim element	Claim amount (USD)	Recommended compensation (USD)
Financial losses	2,250,717	nil
Interest	2,149,702	--
Total	4,400,419	nil

116. Based on its findings regarding Ed Züblin's claim, the Panel recommends no compensation.

VII. SCHEU & WIRTH AG

117. Scheu & Wirth AG ("Scheu & Wirth") is a corporation existing under the laws of Germany which had a contract with the State Company for Drug Industries, Iraq ("SCDI") for the delivery and installation of two boilers.

118. Scheu & Wirth seeks compensation in the amount of USD 369,000 for contract losses and interest.

119. The interest element is in the amount of USD 82,118 (DEM 128,268). For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Scheu & Wirth's claim for interest.

Table 9. Scheu & Wirth's claim

Claim element	Claim amount (USD)
Contract losses	286,882
Interest	82,118
Total	369,000

A. Contract losses

1. Facts and contentions

120. Scheu & Wirth seeks compensation in the total amount of USD 286,882 (DEM 448,109) for contract losses.

121. On 8 May 1985, Scheu & Wirth entered into a contract with the SCDI for the delivery and installation of two boilers. The contract price was payable in eight instalments. Scheu & Wirth states that the first six instalments were paid. The seventh instalment was due on 1 September 1989 and the eighth instalment was due on 1 March 1990. However, Scheu & Wirth alleges that these two instalments were not paid due to Iraq's invasion and occupation of Kuwait.

2. Analysis and valuation

122. On the evidence provided by Scheu & Wirth, the Panel finds that the seventh and eighth instalments relate to work performed prior to 2 May 1990. The claims are therefore outside the jurisdiction of the Commission and are not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

3. Recommendation

123. The Panel recommends no compensation for contract losses.

B. Summary of recommended compensation for Scheu & Wirth

Table 10. Recommended compensation for Scheu & Wirth

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	286,882	nil
Interest	82,118	--
Total	369,000	nil

124. Based on its findings regarding Scheu & Wirth's claim, the Panel recommends no compensation.

VIII. THAMATH INTERNATIONAL

125. Thamath International ("Thamath") is a corporation existing under the laws of India which describes itself as a contractor and manpower consultant. It had a contract (the "contract") for the supply of manpower to Northern Refineries, Baiji, Iraq (the "Iraqi Client") which was interrupted by Iraq's invasion and occupation of Kuwait.

126. Thamath seeks compensation in the amount of USD 749,239 for loss of profits, loss of tangible property, and payment or relief to others.

127. In its response to the article 34 notification submitted on 25 January 2001, Thamath also sought compensation in the amount of USD 506,995 for unpaid invoices on the contract. For the reasons stated in paragraph 37 of the Summary, the Panel does not consider this additional claim.

Table 11. Thamath's claim

Claim element	Claim amount (USD)
Loss of profits	453,195
Loss of tangible property	5,000
Payment or relief to others	291,044
Total	749,239

A. Loss of profits

1. Facts and contentions

128. Thamath seeks compensation in the amount of USD 453,195 for loss of profits.

129. On 2 November 1989, Thamath entered into a contract with the Iraqi Client for the supply of labour and management at the Northern Refineries, Baiji for a period of two years. The number of workers was as demanded by the Iraqi Client from time to time. The supply of workers was to start from 1 January 1990.

130. Clause 12(a) of the contract provided that the Iraqi Client could terminate the contract by three months' notice. Clause 12 (b) of the contract provided that if the contract was terminated by war, and the contractor and workers were compelled to leave, the Iraqi Client was to compensate Thamath by payment of (i) six months' wages of the worker or actual payment made by the contractor to the worker, whichever was less; and (ii) an amount equivalent to the actual loss estimated for the remaining period of the contract.

131. Thamath asserts that the contract was interrupted in August 1990 by Iraq's invasion and occupation of Kuwait. In September 1990, the Iraqi Client stopped supplying food for the workers and approximately 60 per cent of the workers were forced by the Iraqi authorities to dig trenches and

perform other manual work. This is reflected in the salary statement for September 1990, which is lower than the preceding months. The workers were evacuated by the Government of India between 13 October and 25 October 1990.

132. Thamath asserts that the profit for September 1990 was USD 30,213. It asserts that the average monthly profit for the months prior to September 1990 was USD 56,300, but it states that it adopts the September 1990 figure as the basis of its loss of profits claim. Accordingly, the alleged lost profit for September 1990 to December 1991 is USD 453,195, i.e., 15 months at USD 30,213.

2. Analysis and valuation

133. Thamath has provided the contract itself, telegrams from the Iraqi authority requesting workers, payroll information with an explanation on affidavit as to why the original payroll records could not be provided, and audited accounts for the period January to September 1990. It has also provided evidence that the workers' employment contracts were terminated in October 1990 and that the workers were paid six months' salary as compensation at this time.

134. However, the Panel finds that Thamath failed to prove that the contract would have continued until December 1991. The Iraqi Client had a contractual right to terminate the contract with three months' notice. Accordingly, the Panel finds that Thamath has established its loss of profits claim for a three month period. The Panel values the loss of profits at USD 90,639.

3. Recommendation

135. The Panel recommends compensation in the amount of USD 90,639 for loss of profits.

B. Loss of tangible property

1. Facts and contentions

136. Thamath seeks compensation in the amount of USD 5,000 for loss of tangible property. The property includes furniture, office equipment and utensils purchased for the site office in Baiji. Thamath asserts that the property was abandoned when it was forced to evacuate its workers from Baiji, Iraq.

2. Analysis and valuation

137. Thamath provided an affidavit of its branch officer at the time of Iraq's invasion and occupation of Kuwait attesting to the furniture and equipment requirements of the site office in Baiji. It also provided affidavits from two workers on the contract who state that they were responsible for purchasing the property claimed and that it was still in Iraq at the time of Iraq's invasion and occupation of Kuwait. It stated that all other evidence had been destroyed in the course of Iraq's invasion and occupation of Kuwait.

138. Given the evidence provided by Thamath in support of the loss of profits claim which shows that the contract was indeed being performed at the time of the invasion (see paragraphs 133 to 134,

supra), and the fact that the property claimed is of the nature which would ordinarily be found in a site office, the Panel recommends compensation for the loss of tangible property. The Panel values the tangible property at USD 5,000.

3. Recommendation

139. The Panel recommends compensation in the amount of USD 5,000 for loss of tangible property.

C. Payment or relief to others

1. Facts and contentions

140. Thamath seeks compensation in the amount of USD 291,044 for payment or relief to others, including (a) termination of employment contracts (USD 278,764), (b) costs of food (USD 11,264), and (c) travelling expenses (USD 1,016).

141. In relation to item (a), Thamath asserts that Iraq's invasion and occupation of Kuwait forced it to terminate the employment contracts of the 102 workers (97 refinery workers, five management staff) working at the Baiji refinery. In compliance with clause 11 of the standard employment contract, it paid each of them six months' salary.

142. In relation to item (b), Thamath asserts that under the terms of the contract, the Iraqi Client had the responsibility to provide rations for the workers. However, from the last week of August 1990, the Iraqi Client stopped providing rations. Thamath asserts that it was forced to purchase commodities from black-marketeers and way-side hawkers for 30 times their normal price. It continued to do this until the workers were evacuated from Iraq in October 1990. Thamath asserts that the vendors of the commodities refused to issue receipts.

143. In relation to item (c), Thamath asserts that the workers were evacuated from Baiji to Baghdad by private taxi. The total cost was USD 1,016. It asserts that it was not practicable to obtain receipts from the taxi drivers.

2. Analysis and valuation

144. The Panel recommends compensation for loss item (a), termination of employment contracts. Thamath had to pay these amounts directly due to Iraq's invasion and occupation of Kuwait. Thamath provided receipts from the individual workers for the amounts paid.

145. The Panel also recommends compensation for loss items (b) and (c). Thamath provided evidence that it had 102 workers in Iraq and that these workers were evacuated in October 1990. The Panel finds that the amount of loss sustained was USD 12,280.

3. Recommendation

146. The Panel recommends compensation in the amount of USD 291,044 for payment or relief to others.

D. Summary of recommended compensation for Thamath

Table 12. Recommended compensation for Thamath

Claim element	Claim amount (USD)	Recommended compensation (USD)
Loss of profits	453,195	90,639
Loss of tangible property	5,000	5,000
Payment or relief to others	291,044	291,044
Total	749,239	386,683

147. Based on its findings regarding Thamath's claim, the Panel recommends compensation in the amount of USD 386,683. The Panel finds the date of loss to be 2 August 1990.

IX. ENKA INSAAT VE SANAYI, A.S.

148. Enka Insaat Ve Sanayi, A.S. ("Enka") is a corporation existing under the laws of Turkey which was involved in a number of projects in Iraq.

149. Enka seeks compensation in the amount of USD 8,945,701 for contract losses and loss of tangible property.

150. Enka also seeks compensation for interest on the principal amount of any award in an amount to be determined by the Commission. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Enka's claim for interest.

Table 13. Enka's claim

Claim element	Claim amount (USD)
Contract losses	7,265,449
Loss of tangible property	1,680,252
Interest (no amount specified)	--
Total	8,945,701

A. Contract losses

1. Facts and contentions

151. Enka seeks compensation in the total amount of USD 7,265,449 for contract losses. Its claim relates to four projects in Iraq: (a) Tasluja and Kerbela Cement Factory Project; (b) Baghdad Cigarette Factory Project; (c) Second Khabour Bridge Project; and (d) Iraq-Turkey Pipeline Expansion Project. The Panel considers each in turn.

2. Analysis and valuation

(a) Tasluja and Kerbela Cement Factory Project

152. Enka seeks compensation in the total amount of USD 5,199,715 for losses suffered on the Tasluja and Kerbela Cement Factory Project.

153. In 1981 Krupp Polysius AG ("Krupp"), a large German construction company, entered into four contracts with the Ministry of Light Industries, State Organisation for Construction Industries, Iraq ("STOKI") to design and build two cement factories. Enka was not a party to these contracts. Enka was a subcontractor to Krupp, pursuant to four sub-contracts with Krupp. Enka describes these sub-contracts as "nearly identical" to the main contracts between Krupp and STOKI. These sub-contracts were signed between March and September 1981. The sum of the sub-contract prices was DEM 204,045,799.

154. Under the four sub-contracts between Krupp and Enka, Enka's receipt of payment for its services was conditional upon Krupp's receipt of payment from STOKI. However, in relation to the retention monies, Krupp and STOKI made a special arrangement. Krupp paid Enka in full for its services as work was completed even though STOKI was withholding the retention monies. In return for being paid in full, Enka issued bank guarantees to Krupp to cover the retention monies paid to Enka and interest on such amounts. As STOKI paid the retentions to Krupp, Krupp progressively released the bank guarantees. However, if STOKI failed to pay the retentions to Krupp, Krupp could call on the guarantees and Enka would lose its share of those retentions.

155. The final acceptance certificate for the Tasluja cement plant was issued on 28 March 1987. The final acceptance certificate for the Kerbela cement plant was issued on 16 March 1987. However, Enka relies on the payment arrangements which were effective after these dates to argue that its losses were caused by Iraq's invasion and occupation of Kuwait.

156. During the 1980s STOKI experienced difficulties in meeting the payment terms of its contracts with Krupp. STOKI and Krupp entered into a series of deferred payment agreements (dated 24 March 1983, 5 May 1985, 13 April 1987, 18 April 1987). The last such agreement was entered into on 12 March 1990 (the "1990 DPA"). Under the terms of this agreement, STOKI agreed that it owed Krupp a total of DEM 62,133,479. STOKI agreed to pay one third of the outstanding balance in ten instalments commencing in April 1990, and two thirds of the outstanding balance by ten promissory notes which would fall due between July 1992 and April 1994.

157. STOKI failed to meet the terms of the 1990 DPA at the time of Iraq's invasion and occupation of Kuwait. Krupp called on the bank guarantees given by Enka. Enka claimed that Krupp had breached the sub-contracts entered into between Enka and Krupp by entering into the 1990 DPA without Enka's consent. Enka and Krupp resolved this dispute by a settlement agreement dated 23 December 1992 (the "Settlement Agreement").

158. Under the Settlement Agreement, Enka paid Krupp DEM 5,640,000 in exchange for the release of bank guarantees with a value of DEM 10,339,084. In addition, Krupp transferred to Enka two of the promissory notes issued pursuant to the 1990 DPA, due on 16 February 1994 and 28 April 1994 in the total amount of DEM 8,392,340.20.

159. Enka argues that if STOKI had not breached the 1990 DPA, Krupp would have returned the bank guarantees to Enka automatically, without Enka's payment of DEM 5,640,000. Accordingly, Enka argues that it suffered a loss of DEM 5,640,000, or "because STOKI breached the 1990 DPA ... arguably DEM 8,392,340.20".

160. The Panel finds that the work on the Tasluja and Kerbela cement factories was completed in March 1987. Applying the approach taken with respect to "contractual arrangements to defer payments", as set out in paragraphs 68 to 77 of the Summary, the Panel further finds that the deferred payment agreements between Krupp and STOKI providing for payment for some of the work after 2 May 1990, i.e., between 1992 and 1994, do not have the effect of bringing the claim within the jurisdiction of the Commission. Further it is quite clear that Enka settled its entitlements vis-à-vis

Krupp under the Settlement Agreement and accordingly no "loss" remains to be compensated. Finally the Panel notes that the promissory notes that were transferred as part of the Settlement Agreement fell to be honoured in 1994 and therefore also fall outside the jurisdiction of the Commission.

161. Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation for losses on the Tasluja and Kerbela Cement Factory Project.

(b) Baghdad Cigarette Factory Project

162. Enka seeks compensation in the total amount of USD 1,286,515 for retention monies due on the Baghdad Cigarette Factory Project.

163. On 30 July 1981, Kozanoglu-Cavusoglu Construction Company Incorporated ("KCC"), a Turkish company, entered into a contract with the Iraqi Tobacco State Enterprise, Baghdad, Iraq ("ITSE") for the construction and maintenance of a 55,000 square metre cigarette factory. However, in 1984 KCC began to experience financial difficulties and on 15 July 1984, KCC and ITSE terminated the contract. KCC nominated Enka to complete the project, and ITSC and Enka entered into a new contract for the completion of the project. Under the terms of the new contract, all of the property being used on the project was to be transferred to Enka.

164. Enka completed the project in December 1988. At this time it received the provisional acceptance certificate and the last monthly progress payment. However, Enka states that it was still having discussions with ITSE over the issue of the final acceptance certificate and had not yet obtained clearance certificates from various Iraqi governmental authorities when this process was interrupted by Iraq's invasion and occupation of Kuwait.

165. On 20 August 1990, the Ministry of Industry and Military Industrialisation, State Engineering Company for Industrial Design and Construction, Iraq confirmed by letter that Enka was "entitled" to receive "around" IQD 381,000 in retention monies. Enka calculates that the amount owing is actually IQD 380,876.

166. According to the evidence provided by Enka, the provisional acceptance certificate on the contract was issued in December 1988. The contract between KCC and ITSE (later adopted by Enka) states that the period of maintenance is one year. The Panel concludes that the final acceptance certificate was due to have been issued in December 1989 and that the retention monies were due and owing at this time. Accordingly, the claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation for losses on the Baghdad Cigarette Factory Project.

(c) Second Khabour Bridge Project

167. Enka seeks compensation in the total amount of USD 389,815 for losses suffered on the Second Khabour Bridge Project.

168. On 29 May 1984, Enka entered into a contract with the Ministry of Housing and Construction, State Organisation of Roads and Bridges, Iraq ("Ministry of Housing") for the design and construction of a bridge across the Khabour River on the border between Iraq and Turkey. The total contract price was IQD 1,100,000.

169. The maintenance period was completed on 25 December 1986. However, Enka states that the Ministry of Housing owed it a balance of USD 293,586 in progress payments, and USD 96,229 in retention monies.

170. On 8 October 1987, the Ministry of Housing advised Enka that it had decided not to pay Enka's accounts until it had obtained the approval of the Turkish authorities about "cleaning the path of the river". Enka explains in its statement of claim that "the progress payments had been withheld by the Employer because the Iraqi Government wanted the Turkish Government to demolish a reinforcement of the Khabour riverbed in the bridge area and was using Enka as leverage against the Turkish Government".

171. Enka states that on 2 August 1990, it was in the final stages of procuring the clearance certificates which would trigger the release of the monies owed to it. However, due to Iraq's invasion and occupation of Kuwait, Enka's employees were evacuated and Enka was thereby prevented from obtaining the certificates and the retention monies.

172. The evidence provided by Enka shows that the Second Khabour Bridge Project was completed in December 1986. Accordingly, the claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Further, in terms of causation, the evidence provided by Enka shows that the debt was not paid due to Iraq's refusal to pay it from 1986 onwards. In these circumstances, it cannot be said that Enka's loss was directly caused by Iraq's invasion and occupation of Kuwait. Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation for losses on the Second Khabour Bridge Project.

(d) Iraq-Turkey Pipeline Expansion Project

173. Enka seeks compensation in the total amount of USD 389,404 for losses suffered on the Iraq-Turkey Pipeline Expansion Project.

174. On 14 March 1983, a consortium of Enka and Toyo Engineering Corporation, Japan (the "Consortium") entered into a contract with the State Organisation for Oil Projects ("SCOP") for the turnkey design and construction of the facilities necessary to increase the capacity of the Iraq-Turkey pipeline system. The total contract price was IQD 29,534,313.

175. On 14 December 1986, the parties entered into a Supplementary Agreement revising the obligations of the parties under the original contract. This supplementary agreement granted extensions of time, settled the question of liquidated damages for delays, and adjusted the contract price to take into account additional works performed by the Consortium.

176. This Supplementary Agreement also confirmed that SCOP owed Enka USD 247,173 and IQD 44,214 in retention monies. Enka states that SCOP was obliged to release the retention monies after issuing the taking over certificate for variation order numbers 1 and 6, and the maintenance certificate for all of the works.

177. On 9 July 1987, SCOP issued the final acceptance certificate which recited that the taking over certificate for variation order numbers 1 and 6 had been issued, and that the period of maintenance had expired. However, as at 2 August 1990, Enka had not yet received the maintenance certificate. It states that it was collecting the necessary clearance certificates from various governmental authorities, but this process was interrupted by Iraq's invasion and occupation of Kuwait.

178. The evidence provided by Enka shows that the Iraq-Turkey Pipeline Expansion Project was completed in July 1987 and that the retention monies were due and owing at this time. Accordingly, the claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Further, in terms of causation, the evidence provided by Enka shows that it had difficulties obtaining the necessary clearance certificates from 1987, when the work was completed. This indicates that the reason for the difficulties in obtaining the clearance certificates was not directly Iraq's invasion and occupation of Kuwait, but other pre-existing reasons. Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation for losses on the Iraq-Turkey Pipeline Expansion Project.

3. Recommendation

179. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

180. Enka seeks compensation in the amount of USD 1,680,252 for loss of tangible property. The loss was allegedly suffered on the Baghdad Cigarette Factory Project (see: paragraphs 162 to 166, supra). The claim includes (a) property over which Enka acquired ownership by virtue of the contract between Enka and ITSE (see: paragraph 163, supra); and (b) property which was required for the project which Enka purchased on its own.

181. In relation to loss item (a), the contract between Enka and ITSE provided that Enka would acquire ownership of "all the machinery and equipment for construction, installation and workshop as well as the service vehicles, the temporary site facilities and the auxiliary materials, consumables and spare parts supplied or imported for and in relation with the [ITSE/KCC] contract". Enka states that

the actual transfer of ownership of the property to Enka did not take place precisely as set out in the contract. It was held up by disputes with the Iraqi customs authorities and did not take place until "early 1990" when the last dispute was resolved.

182. In relation to loss items (a) and (b), Enka states that it maintained an asset register for the project, which was checked by an Iraqi accountant, as required by law. It relies on the stamped project asset register as at 31 December 1988 as the basis of its claim. The certified list shows the following total acquisition costs (including the USD value at the "contractual conversion rate"):

Asset	(IQD)	(USD)
Barracks	395,382	1,335,513
Machinery and vehicles	804,355	2,716,934
Office and camp fixtures	83,552	282,220
Workshop survey and laboratory equipment	77072	260,332
Total	1,360,361	4,594,999

183. Enka states that the total accumulated depreciation for all of the property stated in the certified list is IQD 862,918 (USD 2,914,747 at the contractual conversion rate). Accordingly, the book value of the property, after depreciation, is USD 1,680,252.

184. Enka states that after the completion of the work in December 1988, the project assets remained at the site because of unresolved customs disputes. ITSE apparently refused to transfer the ownership of the project assets to Enka until Enka paid old customs debts assessed against KCC, while Enka disagreed with the Iraqi customs authorities' assessment of the amounts owing. Enka alleges that the disputes were resolved in early 1990, at which point Enka contends that it officially acquired ownership of the KCC project assets and sought permission of the customs authorities to transfer the bulk of the project assets for use at the Bekhme Dam Project. As at 2 August 1990, Enka alleges that it had not received permission for any such transfers, and the assets were still at the Baghdad cigarette factory site when Iraq invaded Kuwait.

185. Enka states that it had posted some watchmen to protect the assets still at the project site. However, when Iraq invaded Kuwait, Enka's branch office staff and these watchmen were evacuated. Enka states that it has "since received information that the Iraqi government seized the Baghdad Cigarette Factory Project assets ... after Enka's employees were evacuated and that even the office equipment and furniture in its former Baghdad branch office were definitely seized shortly after February 1992".

2. Analysis and valuation

186. In support of its claim for loss of tangible property, Enka provided a fixed asset list dated 31 December 1988, a letter dated 31 July 1990 from the Ministry of Industry and Defence, Iraq to the

Iraqi customs authority stating that it had no objection to the transfer of the ownership of the materials, tools and vehicles (in attached list) from KCC to Enka; a report dated 21 August 1990 from Enka to the Turkish Association of Contractors enclosing a table showing the total damages and risks incurred by Enka in the course of its operations in Iraq, and a report dated 11 December 1990 from Enka to the Department of Banks and Foreign Exchange, Turkey setting out the "rights and claims" arising out of its contracting business in Iraq. The latter two reports are described by Enka as "very preliminary summaries" of damage suffered by Enka as a consequence of Iraq's invasion and occupation of Kuwait.

187. Enka did not provide invoices or other evidence of purchase of the property. It did not provide evidence that the assets included in the fixed asset list dated 31 December 1988 were still at the project site at the time of Iraq's invasion and occupation of Kuwait. The reports dated 21 August 1990 and 11 December 1990 do not constitute independent valuations of the particular items of property constituting the claim. The Panel concludes that Enka did not provide sufficient evidence to substantiate its claim. The Panel recommends no compensation for loss of tangible property.

3. Recommendation

188. The Panel recommends no compensation for loss of tangible property.

C. Summary of recommended compensation for Enka

Table 14. Recommended compensation for Enka

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	7,265,449	nil
Loss of tangible property	1,680,252	nil
Interest (no amount specified)	--	--
Total	8,945,701	nil

189. Based on its findings regarding Enka's claim, the Panel recommends no compensation.

X. CONTRACTORS 600 LIMITED

190. Contractors 600 Limited ("Contractors 600") is a corporation existing under the laws of the United Kingdom which was involved in a number of projects involving railway works in Iraq.

191. Contractors 600 seeks compensation in the amount of USD 3,970,236 (GBP 2,088,344) for contract losses, loss of tangible property, payment or relief to others, financial losses and interest.

192. The interest element is in the amount of USD 828,517 (GBP 435,800). For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Contractors 600's claim for interest.

Table 15. Contractors 600's claim

Claim element	Claim amount (USD)
Contract losses	2,225,354
Loss of tangible property	228,135
Payment or relief to others	432,270
Financial losses	255,960
Interest	828,517
Total	3,970,236

A. Contract losses

1. Facts and contentions

193. Contractors 600 seeks compensation in the amount of USD 2,225,354 (GBP 1,170,536) for contract losses.

194. The claim includes three loss items: (a) outstanding debts in relation to railway works in Iraq (USD 2,114,652 (GBP 1,112,307)), (b) United Kingdom stocks and losses incurred on sale of stock (USD 95,097 (GBP 50,021)), and (c) scrapped tooling (USD 15,605 (GBP 8,208)).

195. In its E claim form, Contractors 600 classified loss items (b) and (c) as tangible property losses but the Panel considers that they are more accurately described as contract losses.

196. The Panel considers each loss item in turn.

2. Analysis and valuation

(a) Outstanding debts in relation to railway works in Iraq

197. Contractors 600 seeks compensation in the amount of USD 2,114,652 for outstanding debts in relation to railway works performed in Iraq.

198. Between May 1980 and July 1989 Contractors 600 entered into a total of nine contracts for the installation of railway maintenance workshop equipment and other related works. The contracts were with the Iraqi Republic Railways Organisation, the New Railway Implementation Authority, Iraq, and in one case, a Korean contractor. The contract prices ranged from GBP 2,394 to GBP 11,354,382. Work on all of the contracts, save one, was completed prior to 2 May 1990. Work on the ninth contract was completed in June 1990.

199. Contractors 600 states that the "total value of debt outstanding in Iraq at 2nd August 1990 was GBP 4,167,464.00. The amount claimed represents 27 per cent of the total outstanding is therefore considered a direct result of the Iraqi invasion of Kuwait". Contractors 600 does not explain this statement in greater detail.

200. The Panel finds that work on eight of the nine contracts the subject of the claim was completed prior to 2 May 1990. Accordingly, the claim in respect of these eight contracts is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation in respect of these eight contracts.

201. In respect of the ninth contract, the only evidence provided by Contractors 600 is documentation showing that advance payment guarantees given by Contractors 600 in relation to certain contracts with the "New Railways Implementation Authority" were still in existence as at March 1992. The Panel finds that this is not sufficient evidence to support the claim in respect of the ninth contract. The Panel recommends no compensation in respect of the ninth contract.

(b) United Kingdom stocks and losses incurred on sale of stock

202. Contractors 600 seeks compensation in the amount of USD 95,097 for United Kingdom stocks and losses incurred on sale of stock.

203. Contractors 600 asserts that between 12 March 1990 and 29 January 1992 it purchased a total of 11 items of stock from various suppliers which it was unable to sell or forced to sell at a loss, due to Iraq's invasion and occupation of Kuwait.

204. Contractors 600 provided the invoice from the supplier in relation to each item of stock the subject of the claim. However, the Panel finds that Contractors 600 did not provide sufficient evidence that its losses were directly caused by Iraq's invasion and occupation of Kuwait. It provided no evidence of its assertion that it could not sell the stock concerned, or that it could only sell it at a

loss. Accordingly, the Panel recommends no compensation for United Kingdom stocks and losses incurred on sale of stock.

(c) Scrapped tooling

205. Contractors 600 seeks compensation in the amount of USD 15,605 for scrapped tooling.

206. Contractors 600 asserts that between July and August 1990 it purchased tooling from Startrite Design Ltd., United Kingdom, which it was forced to scrap due to Iraq's invasion and occupation of Kuwait.

207. Contractors 600 provided the invoices for the tooling from Startrite Design Ltd. However, the Panel finds that Contractors 600 did not provide sufficient evidence that its losses were directly caused by Iraq's invasion and occupation of Kuwait. For example, it provided no evidence of its assertion that the tooling could not be used for any other purpose. Accordingly, the Panel recommends no compensation for scrapped tooling.

3. Recommendation

208. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

209. Contractors 600 seeks compensation in the amount of USD 228,135 (GBP 119,999) for loss of tangible property. The claim includes (a) temporary imports (USD 61,319 (GBP 32,254)), (b) vehicles left in Iraq (USD 72,466 (GBP 38,117)), (c) household effects (USD 1,977 (GBP 1,040)), and (d) stock held at Baghdad International fairground (USD 92,373 (GBP 48,588)).

210. In relation to item (a), temporary imports, Contractors 600 alleges that it lost equipment and machinery imported into Iraq on a temporary basis between 1984 and 1987, due to Iraq's invasion and occupation of Kuwait.

211. In relation to item (b), vehicles left in Iraq, Contractors 600 alleges that it lost four Toyota vehicles due to Iraq's invasion and occupation of Kuwait.

212. In relation to item (c), household effects, Contractors 600 alleges that on 15 December 1990, it handed household effects including a television, video recorder, vacuum cleaner and microwave to a customs clearance agent in Baghdad for "temporary storage", and that the effects were never recovered.

213. In relation to item (d), stock held at the Baghdad International fairground, Contractors 600 alleges that it lost certain items of stock which were located at the Baghdad International fairground due to Iraq's invasion and occupation of Kuwait.

2. Analysis and valuation

214. The Panel finds that Contractors 600 did not provide sufficient evidence to support its claim for loss of tangible property.

215. In relation to item (a), temporary imports, Contractors 600 provided documentation showing the temporary import into Iraq of each of the items of equipment the subject of the claim. However, Contractors 600 did not provide evidence that the property was still in Iraq as at 2 August 1990 or that it was lost directly due to the invasion.

216. In relation to item (b), vehicles left in Iraq, Contractors 600 provided purchase invoices for the vehicles dated May 1989. However, again there is no evidence that the vehicles were still in Iraq as at 2 August 1990 or that they were lost directly due to the invasion.

217. In support of item (c), Contractors 600 provided a receipt dated15 December 1990 for temporary storage of the goods. This receipt is not sufficient to show that Contractors 600 owns the goods, nor that they were lost directly due to Iraq's invasion and occupation of Kuwait.

218. In support of item (d), Contractors 600 provided a list dated 27 November 1989 of "items currently in stock at fair site". Again, this does not constitute evidence of ownership, that the stock was still in Iraq as at 2 August 1990 or that it was lost directly due to the invasion.

219. In view of the evidence provided, the Panel is unable to recommend compensation for any of the loss items.

3. Recommendation

220. The Panel recommends no compensation for loss of tangible property.

C. Payment or relief to others

1. Facts and contentions

221. Contractors 600 seeks compensation in the amount of USD 432,270 (GBP 227,374) for payment or relief to others. The loss items comprising the claim are set out in Table 16.

Table 16. Contractors 600's claim for payment or relief to others

	Loss item	USD	GBP
(a)	Total employee costs	279,300	146,912
(b)	Repatriation costs paid in Iraq	2,021	1,063
(c)	Repatriation costs paid in United Kingdom	22,342	11,752
(d)	General expenses incurred in Iraq	116,462	61,259
(e)	Cancellation fee	2,958	1,556
(f)	Company telephones – calls to Iraq	915	481
(g)	Domestic telephones – calls to Iraq paid by Contractors 600	6,276	3,301
(h)	Additional insurance – employees in Iraq	1,996	1,050
	Total	432,270	227,374

222. In its E claim form, Contractors 600 classified loss items (f), (g) and (h) as losses related to business transaction or course of dealing but the Panel considers that they are more accurately described as payment or relief to others.

223. Loss item (a), total employee costs, includes (i) salaries paid to six staff members on fixed term contracts in Iraq and two permanent employees from 2 August 1990 until the date of their departure from Iraq; (ii) support allowance paid to six staff members on fixed term contracts in Iraq and two permanent employees from 2 August 1990 until the date of their departure from Iraq, and (iii) salaries paid to six permanent staff in the United Kingdom who were engaged in welfare, support and administration following Iraq's invasion and occupation of Kuwait; and (iv) hotel expenses of the General Manager of Contractors 600 incurred in Iraq between August and November 1990 in the course of arranging the departure from Iraq of Contractors 600's employees.

224. Loss item (b), repatriation costs paid in Iraq, relates to airfares allegedly paid by Contractors 600 between August and December 1990 for four employees.

225. Loss item (c), repatriation costs paid in the United Kingdom, concerns air-fares, hotel accommodation, and other expenses allegedly paid by Contractors 600 between September 1990 and July 1991.

226. Loss item (d), general expenses incurred in Iraq, include consumable stores, labour charges, staff welfare and entertainment expenses which Contractors 600 alleges its Baghdad office incurred between September and December 1990 directly due to Iraq's unlawful invasion and occupation of Kuwait.

227. Loss item (e), cancellation fee, is a fee which Contractors 600 paid on behalf of one of its employees who was forced to cancel a family holiday due to Iraq's invasion and occupation of Kuwait.

228. Loss item (f) relates to telephone calls from the United Kingdom to Iraq made on Contractors 600's company phones between October 1990 and January 1991 to employees still in Iraq.

229. Loss item (g) relates to telephone calls made on domestic phones from the United Kingdom to Iraq between October 1990 and February 1991 by the relatives of employees of Contractors 600 to employees still in Iraq. Contractors 600 paid for the calls.

230. Loss item (h), additional insurance, relates to insurance premia incurred by Contractors 600 on 31 August 1990 and 17 January 1991 in respect of two employees of Contractors 600 based in Iraq.

2. Analysis and valuation

231. In relation to loss item (a), total employee costs, Contractors 600 provided no supporting evidence in relation to parts (i), (ii) and (iii) of the claim. Accordingly, the Panel recommends no compensation for these parts. In relation to part (iv) of the claim, the Panel finds that the hotel expenses were incurred directly due to Iraq's invasion and occupation of Kuwait and that Contractors 600 provided sufficient evidence to support the claim. Accordingly, the Panel recommends compensation in the amount of USD 14,933 (GBP 7,855) for loss item (a).

232. In relation to loss item (b), repatriation costs paid in Iraq, and loss item (c), repatriation costs incurred in the United Kingdom, Contractors 600 provided company expense forms for the amounts claimed, correspondence from its agent in Jordan which co-ordinated the repatriation from Iraq, invoices from its United Kingdom travel agent for travel costs, and an affidavit of the General Manager of Contractors 600 attesting to the validity of the claims. However, Contractors 600 provided no evidence that the costs of repatriation exceeded those which would have been incurred in any event upon natural completion of Contractor 600's contracts in Iraq. Accordingly, the Panel is unable to recommend compensation for loss items (b) or (c).

233. In relation to loss item (d), general expenses incurred in Iraq, Contractors 600 provided an internal form of "600 Services Limited" referring to the amounts claimed. However, Contractors 600 did not demonstrate that the losses were incurred directly due to Iraq's invasion and occupation of Kuwait, or that it actually incurred the expenses claimed. Accordingly, the Panel recommends no compensation for loss item (d).

234. In relation to loss item (e), cancellation fee, the Panel finds that the incurring of the fee by Contractors 600 is not directly linked to Iraq's invasion and occupation of Kuwait. Contractors 600 took an independent decision to bear the cost of cancellation of its employee's vacations. Accordingly, the Panel recommends no compensation for loss item (e).

235. In relation to loss items (f) and (g), Contractors 600 provided telephone accounts and invoices in support of the claims. The Panel finds that such charges were incurred directly due to Iraq's

invasion and occupation of Kuwait. The Panel recommends compensation in the amount of USD 7,190 (GBP 3,782) for loss items (f) and (g).

236. In relation to loss item (h), additional insurance, Contractors 600 provided invoices for the insurance premia claimed. The Panel finds that such charges were incurred directly due to Iraq's invasion and occupation of Kuwait. The Panel recommends compensation in the amount of USD 1,996 (GBP 1,050).

3. Recommendation

237. The Panel recommends compensation in the amount of USD 24,119 for payment or relief to others.

D. Financial losses

1. Facts and contentions

238. Contractors 600 seeks compensation in the amount of USD 255,960 (GBP 134,635) for financial losses. The loss items comprising the claim are set out in Table 17.

Table 17. Contractors 600's claim for financial losses

	Loss item	USD	GBP
(a)	Chamber of Commerce, Colchester	563	296
(b)	Courier Service	447	235
(c)	ECGD premium	22,300	11,730
(d)	Guarantee charges	112,211	59,023
(e)	Seminar fees	627	330
(f)	Legal fees	14,133	7,434
(g)	Bank account and petty cash	105,679	55,587
	Total	255,960	134,635

239. In its E claim form, Contractors 600 classified loss items (a) to (f) as losses related to business transaction or course of dealing but the Panel considers that they are more accurately described as financial losses.

240. In its E claim form, Contractors 600 classified loss item (g) as loss of tangible property but the Panel considers it is more accurately described as financial loss.

241. Loss item (a), Chamber of Commerce, Colchester, relates to fees invoiced by the Colchester and District Chamber of Trade and Commerce on 31 July 1990 for Arab certifications. Contractors 600 did not explain the purpose of the certifications.

242. Loss item (b), courier service, relates to services to Baghdad provided by Jet Services UK Ltd. to Contractors 600 between October 1990 and December 1990. Contractors 600 did not explain the object of the services.

243. Loss item (c), Export Credits Guarantee Department ("ECGD") premium, concerns a line of credit premium paid by Contractors 600 to the ECGD in relation to a contract with the Specialised Institute for Engineering Industries, Iraq. The ECGD made an ex-gratia refund of part of the premium paid. Contractors 600 alleges that the amount of GBP 11,730 not refunded is a loss caused directly by Iraq's invasion and occupation of Kuwait.

244. Loss item (d), guarantee charges, is in respect of charges allegedly incurred by Contractors 600 between August 1990 and December 1992. Contractors 600 provided no further detail of the claim.

245. Loss item (e), seminar fees, relates to fees paid by Contractors 600 to the Confederation of British Industry for a number of seminars on the "Gulf crisis" given between September and December 1990.

246. Loss item (f), legal fees, relates to fees paid by Contractors 600 to two different law firms between October 1990 and January 1992 for advice on the implications of the "Gulf crisis".

247. Loss item (g), bank account and petty cash, relates to a bank account with a balance of IQD 29,076 held at the Rasheed Bank which Contractors 600 claims it can no longer access, and IQD 3,920 in petty cash which Contractors 600 alleges it handed to its agent on 16 December 1990 and which it has not recovered since.

2. Analysis and valuation

248. In relation to loss item (a), Chamber of Commerce, Colchester, Contractors 600 provided an invoice from the Chamber of Commerce in support of the claim. However, Contractors 600 did not explain how the fees were incurred directly due to Iraq's invasion and occupation of Kuwait. Accordingly, the Panel recommends no compensation for loss item (a).

249. In relation to loss item (b), courier services, Contractors 600 provided invoices from Jet Services UK Ltd. in support of the claim. However, Contractors 600 did not explain how the services were due directly to Iraq's invasion and occupation of Kuwait. Accordingly, the Panel recommends no compensation for loss item (b).

250. In relation to loss item (c), the ECGD premium, Contractors 600 provided correspondence from the ECGD to Contractors 600 supporting the claim. However, applying the approach taken with respect to premia paid for export credit guarantees, as set out in paragraph 98 of the Summary, the Panel recommends no compensation for loss of the premia.

251. In relation to loss item (d), guarantee charges, Contractors 600 provided a list of the charges allegedly paid. Contractors 600 provided no evidence demonstrating that the charges were incurred directly due to Iraq's invasion and occupation of Kuwait. Accordingly, the Panel recommends no compensation for loss item (d).

252. In relation to loss item (e), seminar fees, the Panel finds that the fees were not incurred directly due to Iraq's invasion and occupation of Kuwait but due to the independent commercial decision of Contractors 600.

253. In relation to loss item (f), legal fees, the Panel considers that it is convenient to begin by noting some general propositions about claimants who have sought to recover payments for legal costs. These legal costs have been incurred consequent upon Iraq's invasion and occupation of Kuwait. It seems to this Panel that, in broad terms, such costs can be divided into three. First there are those costs that have been incurred after the commencement of Iraq's invasion and occupation of Kuwait in seeking advice as to the recovery of outstanding sums, either from the other party to the project contract, or from some other body - e.g. an insurer. Similarly, costs may have been incurred in initiating proceedings directed to the same end and also commenced after 2 August 1990.

254. Second there are those costs that have been directed towards seeking advice as to, or assistance in the mounting of, a claim to the Commission. Third there are legal costs that have been incurred with other aims or for other purposes.

255. It seems to this Panel that the first category is in principle compensable as expenses incurred by way of mitigation. It will then be a matter of evidence to establish the purpose of the advice, assistance or proceedings, and to support the quantification. The second category identified above is properly to be seen as part of the claim preparation costs and therefore falls to be dealt with as set out in paragraph 60. The third category does not appear to be compensable at all.

256. So far as the claim by Contractors 600 is concerned, the Panel finds that the legal fees were not incurred for the purpose of mitigating losses directly caused by Iraq's invasion and occupation of Kuwait, but in relation to general advice on a variety of issues. Accordingly, the Panel finds that the legal fees were not incurred directly due to Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation for loss item (f).

257. In relation to loss item (g), bank account and petty cash, Contractors 600 provided no evidence that the funds could have been exchanged for convertible currencies and transferred out of Iraq. Applying the approach taken with respect to funds in bank accounts in Iraq and petty cash, as set out in paragraphs 135 to 140 of the Summary, the Panel recommends no compensation.

3. Recommendation

258. The Panel recommends no compensation for financial losses.

E. Summary of recommended compensation for Contractors 600

Table 18. Recommended compensation for Contractors 600

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	2,225,354	nil
Loss of tangible property	228,135	nil
Payment or relief to others	432,270	24,119
Financial losses	255,960	nil
Interest	828,517	--
Total	3,970,236	24,119

259. Based on its findings regarding Contractor 600's claim, the Panel recommends compensation in the amount of USD 24,119. The Panel finds the date of loss to be 2 August 1990.

XI. JOHN LAING INTERNATIONAL

260. John Laing International ("John Laing") is a corporation existing under the laws of the United Kingdom. At the time of Iraq's invasion and occupation of Kuwait it was carrying out a contract for the construction of an aeromedical centre in Baghdad.

261. John Laing seeks compensation in the amount of USD 9,590,137 for contract losses and loss of profits.

262. John Laing also seeks compensation for interest on the principal amount of any award in an amount to be determined by the Commission. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to John Laing's claim for interest.

Table 19. John Laing's claim

Claim element	Claim amount (USD)
Contract losses	9,018,757
Loss of profits	571,380
Interest	--
Total	9,590,137

A. Contract losses

1. Facts and contentions

263. John Laing seeks compensation in the total amount of USD 9,018,757 (GBP 4,743,866) for contract losses. The claim includes (a) losses suffered on the aeromedical centre contract (USD 3,485,493 (GBP 1,833,369)), and (b) amount to be repaid to the ECGD (USD 5,533,264 (GBP 2,910,497)).

264. In its E claim form, John Laing classified loss item (b) as payment or relief to others but the Panel considers it is more accurately described as contract losses.

265. At the outset the Panel notes that this claim is related to a claim filed by Tripod Engineering Co. Ltd. ("Tripod") which is also considered by the Panel in this report (see: paragraphs 289 to 328, infra). A real benefit that can flow from the receipt of related claims is that this Panel when dealing with its claims will have a greater body of information than would have been available if only one claim had been presented. Furthermore, when this Panel first addresses a claim in respect of a project where there are related claims before other panels, it will liaise with the other panels so as to address the question of how and by whom the overlap or inter-accounting is to be addressed.

266. On 25 August 1988, Tripod entered into a contract with Iraqi Airways for the design of the building for an aeromedical centre in Baghdad. On 29 June 1989 Tripod entered into an agreement

with John Laing pursuant to which the two parties agreed to form a joint venture to perform the contract. The agreement was to share the profits and losses equally.

267. The total sum of the contract was GBP 18,680,000. This was divided into three components: (a) building design and tender documents (GBP 490,000), (b) site supervision (GBP 300,000), and (c) supply, installation, training, and maintenance of all equipment (GBP 17,890,000).

268. The contract commenced on 14 April 1989 and was due to be completed in 36 months (April 1992). The first component of the contract work, namely, (a) building design and tender documents, was performed and paid for. According to Appendix 1 of the Contract, titled Programme of Works, component (b), site supervision, was due to start in month 24 (April 1991) of the contract, and component (c), delivery of major equipment, was due to start in month 28 of the contract (August 1991).

269. John Laing asserts that on 2 August 1990 the contract was interrupted by Iraq's invasion and occupation of Kuwait. From this date all export licences were withdrawn and no trading by the company was allowed. On 14 August 1990, John Laing gave notice to Iraqi Airways that a state of force majeure existed.

270. John Laing asserts that it incurred costs in the course of preparing for the performance of components (b) and (c) of the contract which, due to Iraq's invasion and occupation of Kuwait, will now never be recovered.

Loss item (a)

271. John Laing calculates loss item (a) of the claim as follows:

Costs	GBP
Prime Cost as per contract cost ledger	5,433,657
Contract staff support costs	204,852
Head Office staff	509,744
Corporate services at 1 per cent prime costs	54,336
Margin at 2.5 per cent	155, 064
Costs of finance	530,493
Total	6,888,146
Less receipts	
From client	(2,124,280)
From ECGD (see: loss item (b))	(2,930,497)
Sub total receipts:	(5,054,777)
Total loss	1,833,369

Loss item (b)

272. Loss item (b) is a claim made by John Laing on behalf of the ECGD. The contract was guaranteed by the ECGD. Under the terms of the ECGD Specific Works guarantee, the ECGD paid John Laing a total of GBP 2,930,497 (on 27 November 1992 and 21 December 1992). John Laing refunded a total of GBP 20,000 to the ECGD in 1993 when it sold to a third party a hyperbaric chamber which had been manufactured for the aeromedical centre contract. John Laing has a continuing obligation to effect recoveries of its losses, and to remit any recoveries to the ECGD.

2. Analysis and valuation

273. In its claim John Laing distinguishes between loss item (a) and loss item (b). However, the fact that a body such as the ECGD has paid a sum of money to a contractor does not prove that that contractor has suffered a loss in that or any amount for the purpose of maintaining a claim before the Commission. Accordingly, while noting the way in which John Laing has formulated its claim, and the fact that it has been paid a substantial sum by the ECGD, the Panel is obliged to analyse the claim and supporting documents filed by John Laing so as to establish what loss, if any, John Laing can support in accordance with the criteria applied by the Commission. The Panel finds that the fact of the payment is irrelevant to the question of loss. Likewise the fact that John Laing makes the application on behalf of the ECGD is irrelevant.

274. That said, the Panel must nonetheless address the question of whether the payment by the ECGD should be taken into account in calculating this final recovery of John Laing in the same way as a settlement or an advance payment would be called into account. It seems to this Panel that the answer is in the negative. The payment by the ECGD is not made on a final basis but is subject to a provision by which John Laing must reimburse the ECGD if it obtains compensation from another source. Accordingly, in so far as the recommendation of this Panel overlaps with this payment made by the ECGD, then to that extent John Laing is bound to return that amount to the ECGD. Payment by the ECGD in that event did not extinguish the claim. In so far as there is no overlap then to that extent the loss which John Laing has claimed is an ongoing loss. Thus it seems to this Panel that the payment by the ECGD would only be contingently relevant to the question of interest, which, for the reasons set out in the Summary at paragraph 58 is not addressed at this time.

275. John Laing provided extensive documentation in support of its claim. It provided a copy of the contract between Tripod and Iraqi Airways, a copy of the joint venture contracts between John Laing and Tripod, supporting evidence for every cost comprising the claim, and extensive correspondence from the ECGD.

276. The Panel finds that the contract was interrupted and could not be resumed directly due to Iraq's invasion and occupation of Kuwait. However, the Panel finds that only GBP 1,293,443 of the total claim amount of GBP 4,743,866 was incurred directly due to Iraq's invasion and occupation of Kuwait. The reasoning of the Panel is as follows.

277. First, the "prime cost as per the contract ledger" constitutes reasonable expenditure given the nature of the contract. However, the Panel has reduced the salary costs of GBP 115,526 by a total of GBP 42,835, being all 1991 costs, because the evidence provided by John Laing indicates that its one member of staff based in Iraq was released in December 1990 and re-assigned to another project in April 1991.

278. Second, John Laing included in its claim for costs, the specific guarantee premium of GBP 1,062,794 paid to the ECGD. However, applying the approach taken with respect to premia paid for export credit guarantees, as set out in paragraph 98 of the Summary, the Panel deducts this cost from the total amount claimed.

279. Third, the contract staff support costs, head office staff costs, and corporate services costs are all calculated costs, not items of expenditure. Applying the approach taken with respect to head office and branch office expenses, as set out in paragraphs 120 – 124 of the Summary, the Panel recommends no compensation for these parts of the claim.

280. Fourth, the Panel recommends no compensation for the costs of finance of GBP 530,493. John Laing provided no proof of a general or specific overdraft facility and in any case such costs are not directly causally linked to Iraq's invasion and occupation of Kuwait but to a company's commercial judgment with respect to the financing of its operations.

281. In conclusion the Panel recommends compensation in the amount of USD 2,459,017 for contract losses.

3. Recommendation

282. The Panel recommends compensation in the amount of USD 2,459,017 for contract losses.

B. Loss of profits

1. Facts and contentions

283. John Laing seeks compensation in the amount of USD 571,380 (GBP 300,546) for lost profits on the aeromedical centre contract. It calculates its lost profits as follows.

	GBP
Anticipated profit on contract: GBP 18,680,000 x 100/102.5 x 2.5 per cent	455,610
Less profit included in contract losses claim	(155,064)
Total	300,546

284. The GBP 155,064 "profit included in contract losses claim" is the "margin at 2.5 per cent" included in the claim for contract losses (see: paragraph 271, supra). That is, this is the portion of profit which is attributable to the period April 1989 until August 1990.

2. Analysis and valuation

285. In support of its loss of profits claim John Laing relied on the extensive documentation provided for its contract losses claim, and a statement by its accountants to the effect that "the margin of 2.5% of total cost, before finance charges, is a reasonable assessment of the net margin (after overheads) projected to be earned on the contract".

286. Applying the evidentiary standard for loss of profits claims set out in paragraphs 125 to 131 of the Summary, the Panel finds that John Laing did not substantiate its loss of profits claim. It has provided evidence of the costs incurred up until August 1990, and also that it had been paid up until that date according to the terms of the contract, but this does not show that the contract would have been successfully completed with the claimed margin of profit.

3. Recommendation

287. The Panel recommends no compensation for loss of profits.

C. Summary of recommended compensation for John Laing

Table 20. Recommended compensation for John Laing

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	9,018,757	2,459,017
Loss of profits	571,380	nil
Interest	--	--
Total	9,590,137	2,459,017

288. Based on its findings regarding John Laing's claim, the Panel recommends compensation in the amount of USD 2,459,017. The Panel finds the date of loss to be 2 August 1990.

XII. TRIPOD ENGINEERING CO. LTD.

289. Tripod Engineering Co. Ltd. ("Tripod") is a corporation existing under the laws of the United Kingdom. Prior to Iraq's invasion and occupation of Kuwait it had entered into a number of contracts with various Iraqi entities, principally concerned with the supply of equipment.

290. It seeks compensation in the amount of USD 9,518,280 for contract losses, and loss of tangible property.

Table 21. Tripod's claim

Claim element	Claim amount (USD)
Contract losses	9,415,618
Loss of tangible property	102,662
Total	9,518,280

A. Contract losses

1. Facts and contentions/analysis and valuation

291. Tripod seeks compensation in the total amount of USD 9,415,618 (GBP 4,952,615) for contract losses. The claim is in respect of six different contracts. The Panel considers each in turn.

(a) Nahrawan Waste Water Treatment Plant

292. Tripod seeks compensation in the amount of USD 3,025,762 (GBP 1,591,551) for losses on a contract related to the Nahrawan waste water treatment plant.

293. On 3 January 1989, Tripod entered into a contract with the State Engineering Company for Industrial Design and Construction, Iraq (the "Iraqi client") for the design of the waste water treatment plant and for the supply of equipment and material for the Iraqi client to install at Nahrawan.

294. The total value of the contract was GBP 1,526,992 plus IQD 12,000 to be paid in Iraq. The contract specified that payments were to be made on a one year deferred payment basis, that is, one year from the date of shipment of the equipment.

295. The evidence provided by Tripod shows that it made 12 shipments of equipment between 17 June 1989 and 19 May 1990. Tripod states that it received only one payment from the Iraqi client, of GBP 26,119, on 1 August 1990.

296. The contract (95 per cent of its value) was guaranteed by the ECGD. Tripod received a total of GBP 1,425,829 from the ECGD, 10 months after the original due dates for payment. Tripod calculates the unpaid balance on the contract as follows:

	GBP
Contract value (1,349,082 + 13.1875 per cent interest)	1,526,992
One payment received from Iraq on 1.8.90	26,119
Total payments due one year after shipment	1,500,873
Less payment received from ECGD	(1,425,829)
Unpaid balance (total)	75,044

297. Tripod calculates the amount claimed as follows:

	GBP
To be repaid to ECGD	1,425,829
Unpaid balance	75,044
Los of profits and interest due to late payments	90,678
Total	1,591,551

298. The Panel finds that 11 of the 12 shipments were made prior to 2 May 1990. Accordingly, the claim in respect of these 11 shipments is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel recommends no compensation in respect of these 11 shipments.

299. So far as the remaining shipment is concerned, made on 19 May 1990, the Panel finds that the claim is within the jurisdiction of the Commission and that Tripod has provided sufficient evidence in support of the claim. The value of the shipment is GBP 109,566. Accordingly, the Panel recommends compensation in the amount of USD 208,300 for this shipment.

(b) Aeromedical Centre

300. Tripod seeks compensation in the amount of USD 6,110,010 (GBP 3,213,865) for losses on a contract related to the aeromedical centre in Baghdad.

301. According to the documents presented by Tripod, on 25 August 1988, Tripod entered into a contract with Iraqi Airways for the design, supervision of construction, supply of equipment, commissioning and training for an aeromedical centre in Baghdad. The total value of the contract was GBP 18,680,000. The work programme for the contract was 36 months.

302. On 27 February 1989, Tripod assigned the 25 August 1988 contract with Iraqi Airways to a joint venture formed by Tripod and John Laing (see paragraphs 260 to 288, supra) for the total

contract price of GBP 2,175,000. John Laing paid a total of GBP 620,000 by August 1989. The remaining amount of GBP 1,555,000 was due between May 1991 and July 1992 and was never paid.

303. The contract was financed under the British/Iraqi line of credit. John Laing was responsible for the ECGD insurance including the pre-credit risk. Due to Iraq's invasion and occupation of Kuwait, the contract was suspended and a claim was submitted to the ECGD under the pre-credit risk cover. On 30 November 1992, John Laing agreed to pay Tripod GBP 950,000 in full and final settlement.

304. Tripod calculates the amount outstanding on the contract as follows:

	GBP
Total amount due from John Laing	2,175,000
Less payments received from John Laing	(620,000)
Less payment received from ECGD (through John Laing)	(950,000)
Balance not paid	605,000

305. Tripod further states that the original intention of Iraqi Airways was for the contract signed on 25 August 1988 to include the supply and installation of electrical and mechanical services in the building in which the aeromedical centre was housed. However, it was then decided to award the main contract first, and issue a variation order for these services at a later date. Tripod states that it was finalising negotiations for this work, the value of which was in excess of GBP 12,000,000 when "the sanctions were imposed and consequently the project cancelled". Tripod states that the resulting loss of profit was GBP 1,400,000.

306. Tripod calculates the amount claimed as compensation as follows:

		GBP
(i)	Outstanding amount not received from John Laing	605,000
(ii)	Bank interest due to late payments	258,865
(iii)	Potential profit due to cancellation of contract	1,400,000
(iv)	Payment from ECGD (to be repaid to ECGD)	950,000
	Total	3,213,865

307. In relation to loss item (i) of the claim, the balance not received from John Laing, the evidence provided by Tripod shows that on 2 November 1992 John Laing and Tripod reached an agreement by which John Laing would pay Tripod GBP 950,000 in full settlement of its claim. Applying the approach taken with respect to "settlements", as set out in paragraphs 152 to 155 of the Summary, the Panel recommends no compensation for this element of the claim.

308. In relation to loss item (ii), bank interest due to late payments, the Panel makes no recommendation, for the reasons stated in paragraph 58 of the Summary.

309. In relation to loss item (iii), potential profit due to cancellation of contract, the Panel finds that Tripod did not provide sufficient evidence to support its allegations in relation to the potential profit. It did not provide documentation to demonstrate that the negotiations for the subsequent variation order were likely to be concluded successfully, nor did it provide documentation supporting its assertion that the work would have been successfully performed with the stated profit margin. Accordingly, the Panel finds that Tripod failed to fulfil the evidentiary standard for loss of profits claims set out in paragraphs 125 to 131 of the Summary, and thus the Panel is unable to recommend compensation.

310. In relation to loss item (iv), the payment of GBP 950,000, the Panel has the following comment. On 2 November 1992, John Laing offered to pay Tripod GBP 950,000 in full and final settlement of any claims by Tripod against John Laing arising out of the joint venture. That offer was subject to the pre-condition that John Laing should have received from the ECGD a settlement of approximately GBP 2.7 million. In fact, on or about 18 November 1992, the ECGD and John Laing agreed upon a settlement and the ECGD implemented that agreement by an admission of liability and a payment in the amount of GBP 2,867,711 (less the uninsured percentage: GBP 2,580,940) on 27 November 1992. In the meantime and in anticipation of the ECGD's admission and payment, Tripod by a signed final account accepted John Laing's offer. The settlement was duly executed.

311. It follows, in the view of the Panel, that not only, as set out above, is it the case that Tripod has not demonstrated that there remains a loss to be compensated by the Commission but that also Tripod has failed to establish that it, Tripod, has any liability to repay any sum to the ECGD. The position appears to this Panel to be reinforced by the fact that the whole of the payment by the ECGD appears in the John Laing claim (see: paragraphs 260 to 288, infra). The Panel therefore considers that the claim is not compensable.

(c) Supply of laboratory equipment

312 Tripod seeks compensation in the amount of USD 49,430 (GBP 26,000) for payment not received for the supply of laboratory equipment to Baghdad University.

313. Tripod provided little information explaining the claim. In its response to the article 34 notification, Tripod states that no evidence is available because the documents were lost in moving offices.

314. Tripod alleges that it supplied the equipment in September 1989 and that payment was agreed to be effected one year from the date of shipment, i.e., September 1990. However, due to Iraq's invasion and occupation of Kuwait payment was not received.

315. According to the information provided by Tripod, the Panel finds that the laboratory equipment was supplied in September 1989. Accordingly, the claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken

with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

(d) Supply of laryngoscope

316. Tripod seeks compensation in the amount of USD 172,684 (GBP 90,832) for payment not received for the supply of a laryngoscope to the Ministry of Health, Baghdad.

317. Tripod shipped the laryngoscope to Iraq on 24 January 1990. Payment was due on 21 January 1991. Tripod alleges that it has never been paid for the equipment due to Iraq's invasion and occupation of Kuwait.

318. The evidence provided by Tripod shows that the laryngoscope was shipped to Iraq on 24 January 1990. Accordingly, the claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

(e) Supply of spare parts for medical equipment

319. Tripod seeks compensation in the amount of USD 5,648 (GBP 2,971) for the supply of spare parts for medical equipment to the Ministry of Health, Baghdad.

320. The spare parts were delivered to Iraq on 30 April 1990. Payment was due on 30 April 1991. However, Tripod states that no payment was ever received due to Iraq's invasion and occupation of Kuwait.

321. The evidence provided by Tripod shows that the spare parts were supplied to Iraq on 30 April 1990. Accordingly, the claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

(f) Supply of scanning microscope

322. Tripod seeks compensation in the amount of USD 52,084 (GBP 27,396) for the supply of a scanning electronic microscope to the Special Institute for Engineering Industries, Iraq. The microscope was air freighted to Iraq on 2 June 1990.

323. The evidence provided by Tripod shows that the microscope was supplied to Iraq on 2 June 1990. Accordingly, the claim is within the jurisdiction of the Commission. Tripod has provided sufficient evidence in support of its claim. The Panel recommends compensation in the amount of USD 52,084.

2. Recommendation

324. The Panel recommends compensation in the amount of USD 260,384 for contract losses.

B. Loss of tangible property

1. Facts and contentions

325. Tripod seeks compensation in the amount of USD 102,662 (GBP 54,000) for loss of tangible property. Tripod states that it had a fully equipped office and fully furnished house in Baghdad. Due to Iraq's invasion and occupation of Kuwait it left the company's property behind. The property includes a Mitsubishi four wheel drive truck, a Chevrolet saloon car, electrical office equipment, office furniture, and house furniture.

2. Analysis and valuation

326. The Panel finds that Tripod did not provide sufficient evidence in support of its claim. In its response to the article 34 notification it provided purchase orders for some of the office equipment, and evidence that it had purchased the four wheel drive truck. However, it provided no evidence that the property claimed was in Iraq as at 2 August 1990 or that it was lost directly due to Iraq's invasion and occupation of Kuwait.

3. Recommendation

327. The Panel recommends no compensation for loss of tangible property.

C. Summary of recommended compensation for Tripod

Table 22. Recommended compensation for Tripod

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	9,415,618	260,384
Loss of tangible property	102,662	nil
Total	9,518,280	260,384

328. Based on its findings regarding Tripod's claim, the Panel recommends compensation in the amount of USD 260,384. The Panel finds the date of loss to be 2 August 1990.

XIII. SUMMARY OF RECOMMENDED COMPENSATION BY CLAIMANT

Table 23. Recommended compensation for the twenty-first instalment

Claimant	Claim amount (USD)	Recommended compensation (USD)
Geotécnica SA	6,291,263	668,181
Charilaos Apostolidis & Co. Ltd.	8,108,211	nil
Ed Züblin (contract claim)	925,529	nil
Ed Züblin (Bank account claim)	4,400,419	nil
Scheu & Wirth AG	369,000	nil
Thamath International	749,239	386,683
Enka Insaat Ve Sanayi, A.S.	8,945,701	nil
Contractors 600 Limited	3,970,236	24,119
John Laing International	9,590,137	2,459,017
Tripod Engineering Co. Ltd.	9,518,280	260,384

Geneva, 20 June 2001

(Signed) John Tackaberry
Chairman

(Signed) Pierre Genton
Commissioner

(Signed) Vinayak Pradhan
Commissioner

Annex

SUMMARY OF GENERAL PROPOSITIONS

CONTENTS

	Paragraph	Page
Introduction	1 - 5	64
I. THE PROCEDURE	6 - 18	65
A. Summary of the process	6	65
B. The nature and purpose of the proceedings	7 - 9	65
C. The procedural history of the "E3" Claims	10 - 18	65
II. PROCEDURAL ISSUES	19 - 37	67
A. Panel recommendations	19 - 21	67
B. Evidence of loss	22 - 34	68
1. Sufficiency of evidence	24 - 28	68
2. Sufficiency under article 35(3): The obligation of disclosure	29	69
3. Missing documents: The nature and adequacy of the paper trail	30 - 34	69
C. Amending claims after filing	35 - 37	70
III. SUBSTANTIVE ISSUES	38 - 155	70
A. Applicable law	38	70
B. Liability of Iraq	39 - 40	70
C. The "arising prior to" clause	41 - 43	71
D. Application of the "direct loss" requirement	44 - 53	72
E. Date of loss	54	73
F. Currency exchange rate	55 - 57	73
G. Interest	58 - 59	74
H. Claim preparation costs	60	74
I. Contract losses	61 - 110	74
1. Claims for contract losses with non-Iraqi party	61 - 63	74
2. Advance payments	64 - 67	75
3. Contractual arrangements to defer payments	68 - 77	75
4. Losses arising as a result of unpaid retention monies	78 - 84	77
5. Guarantees, bonds, and like securities	85 - 94	79
6. Export credit guarantees	95 - 102	80

7. Frustration and force majeure clauses ..... 103 - 110 82
J. Claims for overhead and "lost profits" ..... 111 - 134 83
1. General ..... 111 - 119 83
2. Head office and branch office expenses ..... 120 - 124 84
3. Loss of profits on a particular project ..... 125 - 131 85
4. Loss of profits for future projects ..... 132 - 134 86
K. Loss of monies left in Iraq ..... 135 - 144 87
1. Funds in bank accounts in Iraq ..... 135 - 139 87
2. Petty cash 140 87
3. Customs deposits ..... 141 - 144 88
L. Tangible property ..... 145 - 146 88
M. Payment or relief to others ..... 147 - 151 89
N. Final awards, judgments and settlements ..... 152 - 155 89

Introduction

1. In the Report and Recommendations Made by the Panel of Commissioners Concerning the Fourth Instalment of "E3" Claims (S/AC.26/1999/14) (the "Fourth Report"), this Panel set out some general propositions based on those claims which had come before it and the findings of other panels of Commissioners contained in their reports and recommendations. Those propositions, as well as some observations specific to the claims in the fourth instalment of "E3" claims, are to be found in the introduction to the Fourth Report (the "Preamble").

2. The Fourth Report was approved by the Governing Council in its decision 74 (S/AC.26/Dec.74 (1999)); and the claims that this Panel has subsequently encountered continue to manifest the same or similar issues. Accordingly, the Panel has revised the Preamble, so as to delete the specific comments, and thus present this Summary of General Propositions (the "Summary"). The Summary is intended to be annexed to, and to form part of, the reports and recommendations made by this Panel. The Summary should facilitate the drafting, and reduce the size, of this Panel's future reports, since it will not be necessary to set matters out in extenso in the body of each report.

3. As further issues are resolved, they may be added at the end of future editions of this Summary.

4. In this Summary, the Panel wishes to record:

(a) the procedure involved in evaluating the claims put before it and in formulating recommendations for the consideration of the Governing Council; and

(b) its analyses of the recurrent substantive issues that arise in claims before the Commission relating to construction and engineering contracts.

5. In deciding to draft this Summary in a format which was separated out from the actual recommendations in the report itself, and in a way that was re-usable, the Panel was motivated by a number of matters. One was the desire to keep the substantive element of its reports to a manageable length. As the number of reports generated by the various panels increases, there seems to be a good deal to be said for what might be called economies of scale. Another matter was the awareness of the Panel of the high costs involved in translating official documents from their original language into each official language of the United Nations. The Panel is concerned to avoid the heavy costs of re-translation of recurrent texts, where the Panel is applying established principles to fresh claims. That re-translation would occur if the reasoning set out in this Summary had been incorporated into the principal text of each report at each relevant point. And, of course, that very repetition of principles seems unnecessary in itself, and this Summary avoids it. In sum, it is the intention of the Panel to shorten those reports and recommendations, wherever possible, and thereby to reduce the cost of translating them.

I. THE PROCEDURE

A. Summary of the process

6. Each of the claimants whose claims are presented to this Panel is given the opportunity to provide the Panel with information and documentation concerning the claims. In its review of the claims, the Panel considers evidence from the claimants and the responses of Governments to the reports of the Executive Secretary issued pursuant to article 16 of the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the "Rules"). The Panel has retained consultants with expertise in valuation and in construction and engineering. The Panel has taken note of certain findings by other panels, approved by the Governing Council, regarding the interpretation of relevant Security Council resolutions and Governing Council decisions. The Panel is mindful of its function to provide an element of due process in the review of claims filed with the Commission. Finally, the Panel expounds in this Summary both procedural and substantive aspects of the process of formulating recommendations in its consideration of the individual claims.

B. The nature and purpose of the proceedings

7. The status and functions of the Commission are set forth in the report of the Secretary-General pursuant to paragraph 19 of Security Council resolution 687 (1991) dated 2 May 1991 (S/22559).

8. The Panel is entrusted with three tasks in its proceedings. First, the Panel is required to determine whether the various types of losses alleged by the claimants are within the jurisdiction of the Commission, i.e., whether the losses were caused directly by Iraq's invasion and occupation of Kuwait. Second, the Panel has to verify whether the alleged losses that are in principle compensable have in fact been incurred by a given claimant. Third, the Panel is required to determine whether these compensable losses were incurred in the amounts claimed, and if not, the appropriate quantum for the loss based on the evidence before the Panel.

9. In fulfilling these tasks, the Panel considers that the vast number of claims before the Commission and the time limits in the Rules necessitate the use of an approach which is itself unique, but the principal characteristics of which are rooted in generally accepted procedures for claim determination, both domestic and international. It involves the employment of well established general legal standards of proof and valuation methods that have much experience behind them. The resultant process is essentially documentary rather than oral, and inquisitorial rather than adversarial. This method both realises and balances the twin objectives of speed and accuracy. It also permits the efficient resolution of the thousands of claims filed by corporations with the Commission.

C. The procedural history of the "E3" Claims

10. The claims submitted to the Panel are selected by the secretariat of the Commission from among the construction and engineering claims (the ""E3" Claims") on the basis of established criteria. These include the date of filing and compliance by claimants with the requirements established for claims submitted by corporations and other legal entities (the "category "E" claims").

11. Prior to presenting each instalment of claims to the Panel, the secretariat performs a preliminary assessment of each claim included in a particular instalment in order to determine whether the claim meets the formal requirements established by the Governing Council in article 14 of the Rules.

12. Article 14 of the Rules sets forth the formal requirements for claims submitted by corporations and other legal entities. These claimants must submit:

(a) an "E" claim form with four copies in English or with an English translation;

(b) evidence of the amount, type and causes of losses;

(c) an affirmation by the Government that, to the best of its knowledge, the claimant is incorporated in or organized under the law of the Government submitting the claim;

(d) documents evidencing the name, address and place of incorporation or organization of the claimant;

(e) evidence that the claimant was, on the date on which the claim arose, incorporated or organized under the law of the Government which has submitted the claim;

(f) a general description of the legal structure of the claimant; and

(g) an affirmation by the authorized official for the claimant that the information contained in the claim is correct.

13. Additionally, the "E" claim form requires that a claimant submit with its claim a separate statement in English explaining its claim ("Statement of Claim"), supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed losses. The following particulars are requested in the "INSTRUCTIONS FOR CLAIMANTS":

(a) the date, type and basis of the Commission's jurisdiction for each element of loss;

(b) the facts supporting the claim;

(c) the legal basis for each element of the claim; and

(d) the amount of compensation sought and an explanation of how the amount was calculated.

14. If it is determined that a claim does not provide these particulars or does not include a Statement of Claim, the claimant is notified of the deficiencies and invited to provide the necessary information pursuant to article 15 of the Rules (the "article 15 notification"). If a claimant fails to respond to that notification, the claimant is sent a formal article 15 notification.

15. Further, a review of the legal and evidentiary basis of each claim identifies specific questions as to the evidentiary support for the alleged losses. It also highlights areas of the claim in which further information or documentation is required. Consequently, questions and requests for additional documentation are transmitted to the claimants pursuant to article 34 of the Rules (the "article 34

notification"). If a claimant fails to respond to the article 34 notification, a reminder notification is sent to the claimant. Upon receipt of the responses and additional documentation, a detailed factual and legal analysis of each claim is conducted. Communications with claimants are made through their respective governments.

16. It is the experience of the Panel in the claims reviewed by it to date that this analysis usually brings to light the fact that many claimants lodge little material of a genuinely probative nature when they initially file their claims. It also appears that many claimants do not retain clearly relevant documentation and are unable to provide it when asked for it. Indeed, some claimants destroy documents in the course of a normal administrative process without distinguishing between documents with no long term purpose and documents necessary to support the claims that they have put forward. Some claimants carry this to the extreme of having to ask the Commission, when responding to an article 15 or an article 34 notification, for a copy of their own claim. Finally, some claimants do not respond to requests for further information and evidence. The consequence is inevitably that for a large number of loss elements and a smaller number of claimants the Panel is unable to recommend any compensation.

17. The Panel performs a thorough and detailed factual and legal review of the claims. The Panel assumes an investigative role that goes beyond reliance merely on information and argument supplied with the claims as presented. After a review of the relevant information and documentation, the Panel makes initial determinations as to the compensability of the loss elements of each claim. Next, reports on each of the claims are prepared focusing on the appropriate valuation of each of the compensable losses, and on the question of whether the evidence produced by the claimant is sufficient in accordance with article 35(3) of the Rules.

18. The cumulative effect is one of the following recommendations: (a) compensation for the loss in the full amount claimed; (b) compensation for the loss in a lower amount than that claimed; or (c) no compensation.

II. PROCEDURAL ISSUES

A. Panel recommendations

19. Once a motivated recommendation of a panel is adopted by a decision of the Governing Council, it is something to which this Panel gives great weight.

20. All panel recommendations are supported by a full analysis. When a new claim is presented to this Panel it may happen that the new claim will manifest the same characteristics as the previous claim which has been presented to a prior panel. In that event, this Panel will follow the principle developed by the prior panel. Of course, there may still be differences inherent in the two claims at the level of proof of causation or quantum. Nonetheless the principle will be the same.

21. Alternatively, that second claim will manifest different characteristics to the first claim. In that event, those different characteristics may give rise to a different issue of principle and thus warrant a different conclusion by this Panel to that of the previous panel.

B. Evidence of loss

22. Pursuant to article 35(3) of the Rules, corporate claims must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss. The Governing Council has stated in paragraph 5 of decision 15 that, with respect to business losses, there "will be a need for detailed factual descriptions of the circumstances of the claimed loss, damage or injury" in order to justify a recommendation for compensation (S/AC.26/1992/15).

23. The Panel takes this opportunity to emphasise that what is required of a claimant by article 35(3) of the Rules is the presentation to the Commission of evidence that must go to both causation and quantum. The Panel's interpretation of what is appropriate and sufficient evidence will vary according to the nature of the claim. In implementing this approach, the Panel applies the relevant principles extracted from those within the corpus of principles referred to in article 31 of the Rules.

1. Sufficiency of evidence

24. In the final outcome, claims that are not supported by sufficient and appropriate evidence fail. In the context of the construction and engineering claims that are before this Panel, the most important evidence is documentary. It is in this context that the Panel records a syndrome which it found striking when it addressed the first claims presented to it and which has continued to manifest itself in the claims subsequently encountered. This was the reluctance of claimants to make critical documentation available to the Panel.

25. Imperatively, the express wording of decision 46 of the Governing Council requires that "... claims received in categories 'D', 'E', and 'F' must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss ..." In this same decision, the Governing Council confirmed that "... no loss shall be compensated by the Commission solely on the basis of an explanatory statement provided by the claimant,..." (S/AC.26/Dec.46(1998)).

26. It is also the case that the Panel has power under the Rules to request additional information and, in unusually large or complex cases, further written submissions. Such requests usually take the form of procedural orders. Where such orders are issued, considerable emphasis is placed on this need for sufficient documentary and other appropriate evidence.

27. Thus there is an obligation to provide the relevant documentary evidence both on the first filing of a claim and on any subsequent steps.

28. What is more, the absence of any relevant contemporary record to support a particular claim means that the claimant is inviting the Panel to make an award, often of millions of dollars, on no foundation other than the assertion of the claimant. This would not satisfy the "sufficient evidence" rule in article 35(3) of the Rules and would go against the instruction of the Governing Council contained in decision 46. It is something that the Panel is unable to do.

2. Sufficiency under article 35(3): The obligation of disclosure

29. Next in the context of documentary evidence, this Panel wishes to highlight an important aspect of the rule that claims must be supported by sufficient documentary and other appropriate evidence. This involves bringing to the attention of the Commission all material aspects of the claim, whether such aspects are seen by the claimant as beneficial to, or reductive of, its claims. The obligation is not dissimilar to good faith requirements under domestic jurisdictions.

3. Missing documents: The nature and adequacy of the paper trail

30. The Panel now turns to the question of what is required in order to establish an adequate paper trail.

31. Where documents cannot be supplied, their absence must be explained in a credible manner. The explanation must itself be supported by the appropriate evidence. Claimants may also supply substitute documentation for or information about the missing documents. Claimants must remember that the mere fact that they suffered a loss at the same time as the hostilities in the Persian Gulf were starting or were in process does not mean that the loss was directly caused by Iraq's invasion and occupation of Kuwait. A causative link must be established. It should also be borne in mind that it was not the intention of the Security Council in its resolutions to provide a "new for old" basis of reimbursement of the losses suffered in respect of tangible property. Capital goods depreciate. That depreciation must be taken into account and demonstrated in the evidence filed with the Commission. In sum, in order for evidence to be considered appropriate and sufficient to demonstrate a loss, the Panel expects claimants to present to the Commission a coherent, logical and sufficiently evidenced file leading to the financial claims that they are making.

32. Of course, the Panel recognises that in time of civil disturbances, the quality of proof may fall below that which would be submitted in a peace time situation. Persons who are fleeing for their lives do not stop to collect the audit records. Allowances have to be made for such vicissitudes.

33. Thus the Panel is not surprised that some of the claimants in the instalments presented to it to date seek to explain the lack of documentation by asserting that it is, or was, located in areas of civil disorder or has been lost or destroyed, or, at least, cannot be accessed. But the fact that offices on the ground in the region have been looted or destroyed would not explain why claimants have not produced any of the documentary records that would reasonably be expected to be found at claimants' head offices situated in other countries.

34. The Panel approaches the claims presented to it in the light of the general and specific requirements to produce documents noted above. Where there is a lack of documentation, combined with no or no adequate explanation for that lack, and an absence of alternative evidence to make good any part of that lack, the Panel has no opportunity or basis upon which to make a recommendation.

C. Amending claims after filing

35. In the course of processing the claims after they have been filed with the Commission, further information is sought from the claimants pursuant to the Rules. When the claimants respond they sometimes seek to use the opportunity to amend their claims. For example, they add new loss elements. They increase the amount originally sought in respect of a particular loss element. They transfer monies between or otherwise adjust the calculation of two or more loss elements. In some cases, they do all of these.

36. The Panel notes that the period for filing category "E" claims expired on 1 January 1996. The Governing Council approved a mechanism for these claimants to file unsolicited supplements until 11 May 1998. After that date a response to an inquiry for additional evidence is not an opportunity for a claimant to increase the quantum of a loss element or elements or to seek to recover in respect of new loss elements. In these circumstances, the Panel is unable to take into account such increases or such new loss elements when it is formulating its recommendations to the Governing Council. It does, however, take into account additional documentation where that is relevant to the original claim, either in principle or in detail. It also exercises its inherent powers to re-characterise a loss, which is properly submitted as to time, but is inappropriately allocated.

37. Some claimants also file unsolicited submissions. These too sometimes seek to increase the original claim in the ways indicated in the previous paragraph. Such submissions when received after 11 May 1998 are to be treated in the same way as amendments put forward in solicited supplements. Accordingly, the Panel is unable to, and does not take into account such amendments when it is formulating its recommendations to the Governing Council.

III. SUBSTANTIVE ISSUES

A. Applicable law

38. As set forth in paragraphs 17 and 18 of the Fourth Report, paragraph 16 of Security Council resolution 687 (1991) reaffirmed the liability of Iraq and defined the jurisdiction of the Commission. Pursuant to article 31 of the Rules, the Panel applies Security Council resolution 687 (1991), other relevant Security Council resolutions, decisions of the Governing Council, and, where necessary, other relevant rules of international law.

B. Liability of Iraq

39. When adopting resolution 687 (1991), the Security Council acted under chapter VII of the Charter of the United Nations which provides for maintenance or restoration of international peace and security. The Security Council also acted under chapter VII when adopting resolution 692 (1991), in which it decided to establish the Commission and the Compensation Fund referred to in paragraph 18 of resolution 687 (1991). Specifically, under resolution 687 (1991), the issue of Iraq's liability for losses falling within the Commission's jurisdiction is resolved and is not subject to review by the Panel.

40. In this context, it is necessary to address the meaning of the term "Iraq". In Governing Council decision 9 (S/AC.26/1992/9) and other Governing Council decisions, the word "Iraq" was used to mean the Government of Iraq, its political subdivisions, or any agency, ministry, instrumentality or entity (notably public sector enterprises) controlled by the Government of Iraq. In the Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Instalment of "E3" Claims (the "Fifth Report", S/AC.26/1999/2), this Panel adopted the presumption that for contracts performed in Iraq, the other contracting party was an Iraqi Government entity.

C. The "arising prior to" clause

41. The Panel recognises that it is difficult to establish a fixed date for the exclusion of its jurisdiction that does not contain an arbitrary element. With respect to the interpretation of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), the Panel of Commissioners that reviewed the first instalment of "E2" claims concluded that the "arising prior to" clause was intended to exclude the foreign debt of Iraq which existed at the time of Iraq's invasion of Kuwait from the jurisdiction of the Commission. As a result, the "E2" Panel found that:

> "In the case of contracts with Iraq, where the performance giving rise to the original debt had been rendered by a claimant more than three months prior to 2 August 1990, that is, prior to 2 May 1990, claims based on payments owed, in kind or in cash, for such performance are outside of the jurisdiction of the Commission as claims for debts or obligations arising prior to 2 August 1990." (Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "E2" Claims, S/AC.26/1998/7, paragraph 90)).

42. That report was approved by the Governing Council. Accordingly, this Panel adopts the "E2" Panel's interpretation which is to the following effect:

(a) the phrase "without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through normal mechanisms" was intended to have an exclusionary effect on the Commission's jurisdiction, i.e., such debts and obligations are not compensable by the Commission;

(b) the limitation contained in the clause "arising prior to 2 August 1990" was intended to leave unaffected the debts and obligations of Iraq which existed prior to Iraq's invasion and occupation of Kuwait; and

(c) the terms "debts" and "obligations" should be given the customary and usual meanings applied to them in ordinary discourse.

43. Thus, this Panel accepts that, in general, a claim relating to a "debt or obligation arising prior to 2 August 1990" means a debt or obligation that is based on work performed or services rendered prior to 2 May 1990.

D. Application of the "direct loss" requirement

44. Paragraph 21 of Governing Council decision 7 (S/AC.26/1991/7/Rev.1) is the seminal rule on "directness" for category "E" claims. It provides in relevant part that compensation is available for:

> "... any direct loss, damage, or injury to corporations and other entities as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of:
>
> (a) Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;
>
> (b) Departure of persons from or their inability to leave Iraq or Kuwait (or a decision not to return) during that period;
>
> (c) Actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;
>
> (d) The breakdown of civil order in Kuwait or Iraq during that period, or
>
> (e) Hostage-taking or other illegal detention."

45. The text of paragraph 21 of decision 7 is not exhaustive and leaves open the possibility that there may be causes of "direct loss" other than those enumerated. Paragraph 6 of decision 15 of the Governing Council (S/AC.26/1992/15) confirms that there "will be other situations where evidence can be produced showing claims are for direct loss, damage or injury as a result of Iraq's unlawful invasion and occupation of Kuwait". Should that be the case, the claimants will have to prove specifically that a loss that was not suffered as a result of one of the five categories of events set out in paragraph 21 of decision 7 is nevertheless "direct". Paragraph 3 of decision 15 emphasises that for any alleged loss or damage to be compensable, the "causal link must be direct". (See also paragraph 9 of decision 9).

46. While the phrase "as a result of" contained in paragraph 21 of decision 7 is not further clarified, Governing Council decision 9 provides guidance as to what may be considered business "losses suffered as a result of" Iraq's invasion and occupation of Kuwait. It identifies the three main categories of loss types in the "E" claims: losses in connection with contracts, losses relating to tangible assets and losses relating to income-producing properties. Thus, decisions 7 and 9 provide specific guidance to the Panel as to how the "direct loss" requirement must be interpreted.

47. In the light of the decisions of the Governing Council identified above, the Panel has reached certain conclusions as to the meaning of "direct loss". These conclusions are set out in the following paragraphs.

48. With respect to physical assets in Iraq or in Kuwait as at 2 August 1990, a claimant can prove a direct loss by demonstrating two matters. First, that the breakdown in civil order in these countries, which resulted from Iraq's invasion and occupation of Kuwait, caused the claimant to evacuate its

employees. Second, as set forth in paragraph 13 of decision 9, that the claimant left physical assets in Iraq or in Kuwait.

49. With respect to losses relating to contracts to which Iraq was a party, force majeure or similar legal principles are not available as a defence to the obligations of Iraq.

50. With respect to losses relating to contracts to which Iraq was not a party, a claimant may prove a direct loss if it can establish that Iraq's invasion and occupation of Kuwait or the breakdown in civil order in Iraq or Kuwait following Iraq's invasion caused the claimant to evacuate the personnel needed to perform the contract.

51. In the context of the losses set out above, reasonable costs which have been incurred to mitigate those losses are direct losses. The Panel bears in mind that the claimant was under a duty to mitigate any losses that could have been reasonably avoided after the evacuation of its personnel from Iraq or Kuwait.

52. These findings regarding the meaning of "direct loss" are not intended to resolve every issue that may arise with respect to this Panel's interpretation of Governing Council decisions 7 and 9. Rather, these findings are intended as initial parameters for the review and evaluation of the claims.

53. Finally, there is the question of the geographical extent of the impact of events in Iraq and Kuwait outside these two countries. Following on the findings of the "E2" Panel in its first report, this Panel finds that damage or loss suffered as a result of (a) military operations in the region by either the Iraqi or the Allied Coalition Forces or (b) a credible and serious threat of military action that was connected to Iraq's invasion and occupation of Kuwait is compensable in principle. Of course, the further the project in question was from the area where military operations were taking place, the more the claimant may have to do to establish causality. On the other hand, the potential that an event such as the invasion and occupation of Kuwait has for causing an extensive ripple effect cannot be ignored. Each case must depend on its facts.

E. Date of loss

54. There is no general principle with respect to the date of loss. It needs to be addressed on an individual basis. In addition, the specific loss elements of each claim may give rise to different dates if analysed strictly. However, applying a different date to each loss element within a particular claim is impracticable as a matter of administration. Accordingly, the Panel has decided to determine a single date of loss for each claimant, which, in most cases, coincides with the date of the collapse of the project.

F. Currency exchange rate

55. While many of the costs incurred by the claimants were denominated in currencies other than United States dollars, the Commission issues its awards in that currency. Therefore the Panel is required to determine the appropriate rate of exchange to apply to losses expressed in other currencies.

56. The Panel finds that, as a general rule, where an exchange rate is set forth in the contract then that is the appropriate rate for losses under the relevant contracts because this was specifically agreed by the parties.

57. For losses that are not contract based, however, the contract rate is not usually an appropriate rate of exchange. For non-contractual losses, the Panel finds the appropriate exchange rate to be the prevailing commercial rate, as evidenced by the United Nations Monthly Bulletin of Statistics, at the date of loss.

G. Interest

58. On the issue of the appropriate interest rate to be applied, the relevant Governing Council decision is decision 16 (S/AC.26/1992/16). According to that decision, "[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award". In decision 16 the Governing Council further specified that "[i]nterest will be paid after the principal amount of awards", while postponing any decision on the methods of calculation and payment.

59. Accordingly, the Panel recommends that interest shall run from the date of loss.

H. Claim preparation costs

60. Some claimants seek to recover compensation for the cost of preparing their claims. The compensability of claim preparation costs has not hitherto been ruled on and will be the subject, in due course, of a specific decision by the Governing Council. Therefore, this Panel has made and will make no recommendations with respect to claim preparation costs in any of the claims where they have been raised.

I. Contract losses

1. Claims for contract losses with non-Iraqi party

61. Some of the claims relate to losses suffered as a result of non-payment by a non-Iraqi party. The fact of such a loss, simpliciter, does not establish it as a direct loss within the meaning of Security Council resolution 687 (1991). In order to obtain compensation, a claimant must lodge sufficient evidence that the entity with which it carried on business on 2 August 1990 was unable to make payment as a direct result of Iraq's invasion and occupation of Kuwait.

62. A good example of this would be that the party was insolvent and that the insolvency was a direct result of Iraq's invasion and occupation of Kuwait. At the very least a claimant should demonstrate that the other party had not renewed operations after the end of the occupation. In the event that there are multiple factors which have resulted in the failure to resume operations, apart from the proved insolvency of the other party, the Panel will have to be satisfied that the effective reason or causa causans was Iraq's invasion and occupation of Kuwait.

63. Any failure to pay because the other party was excused from performance by the operation of law which came into force after Iraq's invasion and occupation of Kuwait is in the opinion of this Panel the result of a novus actus interveniens and is not a direct loss arising out of Iraq's invasion and occupation of Kuwait.

2. Advance payments

64. Many construction contracts provide for an advance payment to be made by the employer to the contractor. These advance payments are often calculated as a percentage of the initial price (initial, because many such contracts provide for automatic and other adjustments of the price during the execution of the works). The purpose of the advance payment is to facilitate certain activities which the contractor will need to carry out in the early stages.

65. Mobilisation is often one such activity. Plant and equipment may need to be purchased. A workforce will have to be assembled and transported to the work site, where facilities will be needed to accommodate it. Another such activity is the ordering of substantial or important materials which are in short supply and may, therefore, be available only at a premium or at a long lead time.

66. Advance payments are usually secured by a bond provided by the contractor, and are usually paid upon the provision of the bond. They are frequently repaid over a period of time by way of deduction by the employer from the sums which are payable at regular intervals (often monthly) to the contractor for work done. See, in the context of payments which are recovered over a period of time, the observations about amortisation at paragraph 120, infra. Those observations apply mutatis mutandis to the repayment of advance payments.

67. The Panel notes that some claimants presenting claims have not clearly accounted for the amounts of money already paid to them by the employer. This Panel regularly sees evidence of advance payments amounting to tens of millions of United States dollars. Where advance payments have been part of the contractual arrangements between the claimant and the employer, the claimant must account for these payments in reduction of its claims, unless these payments can be shown to have been recouped in whole or in part by the employer. Where no explanation or proof of repayment is forthcoming, the Panel has no option but to conclude that these amounts paid in advance are due, on a final accounting, to the employer, and must be deducted from the claimant's claim.

3. Contractual arrangements to defer payments

(a) The analysis of "old debt"

68. Where payments are deferred under the contracts upon which the claims are based, an issue arises as to whether the claimed losses are "debts and obligations arising prior to 2 August 1990" and therefore outside the jurisdiction of the Commission.

69. In its first report, the "E2" Panel interpreted Security Council resolution 687 (1991) as intending to eliminate what may be conveniently called "old debt". In applying this interpretation to the claim before it the "E2" Panel identified, as "old debt", cases where the performance giving rise to the

original debt had been rendered by a claimant more than three months prior to 2 August 1990, that is, prior to 2 May 1990. In those cases, claims based on payments owed, in kind or in cash, for such performance are outside the jurisdiction of the Commission as claims for debts or obligations arising prior to 2 August 1990. "Performance" as understood by the "E2" Panel for the purposes of this rule meant complete performance under a contract, or partial performance, so long as an amount was agreed to be paid for that portion of completed partial performance. In the claim the "E2" Panel was considering, the work under the contract was clearly performed prior to 2 May 1990. However, the debts were covered by a form of deferred payments agreement dated 29 July 1984. This agreement was concluded between the parties to the original contracts and postdated the latter.

70. In its analysis, the "E2" Panel found that deferred payments arrangements go to the very heart of what the Security Council described in paragraph 16 of resolution 687 as a debt of Iraq arising prior to 2 August 1990. It was this very kind of obligation which the Security Council had in mind when, in paragraph 17 of resolution 687 (1991), it directed Iraq to "adhere scrupulously" to satisfying "all of its obligations concerning servicing and repayment". Therefore, irrespective of whether such deferred payment arrangements may have created new obligations on the part of Iraq under a particular applicable municipal law, they did not do so for the purposes of resolution 687 (1991) and are therefore outside the jurisdiction of this Commission.

71. The arrangements that the "E2" Panel was considering were not arrangements that arose out of genuine arms' length commercial transactions, entered into by construction companies as part and parcel of their normal businesses. Instead the situation which the "E2" Panel was addressing was described as follows:

> "The negotiation of these deferred payment arrangements was typically conducted with Iraq not by the contractor or supplier itself, but rather by its Government. Typically, the Government negotiated on behalf of all of the contracting parties from the country concerned who were in a similar situation. The deferred payment arrangements with Iraq were commonly entered into under a variety of forms, including complicated crude oil barter arrangements under which Iraq would deliver certain amounts of crude oil to a foreign State to satisfy consolidated debts; the foreign State then would sell the oil and, through its central bank, credit particular contractors' accounts." (S/AC.26/1998/7, paragraph 93).

> "Iraq's debts were typically deferred by contractors who could not afford to "cut their losses" and leave, and thus these contractors continued to work in the hope of eventual satisfaction and continued to amass large credits with Iraq. In addition, the payment terms were deferred for such long periods that the debt servicing costs alone had a significant impact on the continued growth of Iraq's foreign debt." (S/AC.26/1998/7, paragraph 94).

72. This Panel agrees.

(b) Application of the "old debt" analysis

73. In the application of this analysis to claims other than those considered by the "E2" Panel, there are two aspects which are worth mentioning.

74. The first is that the problem does not arise where the actual work has been performed after 2 May 1990. The arrangement deferring payment is irrelevant to the issue. The issue typically resolves itself in these cases into one of proof of the execution of the work, the quantum, the non payment and causation.

75. The second concerns the ambit of the above analysis. As noted above, the claims which led to the above analysis arose out of "non-commercial" arrangements. They were situations where the original terms of payment entered into between the parties had been renegotiated during the currency of the contract or the negotiations or renegotiations were driven by inter-governmental exchanges. Such arrangements were clearly the result of the impact of Iraq's increasing international debt.

76. Thus one can see underlying the "E2" Panel's analysis two important factors. The first was the subsequent renegotiation of the payment terms of an existing contract to the detriment of the claimant (contractor). The second was the influence on contracts of the transactions between the respective governments. In both cases, a key element underlying the arrangements must be the impact of Iraq's mountain of old debt.

77. In the view of this Panel, where either of these factors is wholly or partially the explanation of the "loss" suffered by the claimant, then that loss or the relevant part of it is outside the jurisdiction of the Commission and cannot form the basis of recommendation by a panel. It is not necessary that both factors be present. A contract that contained deferment provisions as originally executed would still be caught by the "arising prior to" rule if the contract was the result of an inter-governmental agreement driven by the exigencies of Iraq's financial problems. It would not be a commercial transaction so much as a political agreement, and the "loss" would not be a loss falling within the jurisdiction of the Commission.

4. Losses arising as a result of unpaid retention monies

78. The claims before this Panel include requests for compensation for what could be described as another form of deferred payment, namely unpaid retention monies.

79. Under many if not most construction contracts, provision is made for the regular payment to the contractor of sums of money during the performance of the work under the contract. The payments are often monthly, and often calculated by reference to the amount of work that the contractor has done since the last regular payment was calculated.

80. Where the payment is directly related to the work done, it is almost invariably the case that the amount of the actual (net) payment is less than the contractual value of the work done. This is because the employer retains in his own hands a percentage (usually 5 per cent or 10 per cent and with or without an upper limit) of that contractual value. (The same approach usually obtains as between the

contractor and his subcontractors.) The retained amount is often called the "retention" or the "retention fund". It builds up over time. The less work the contractor carries out before the project comes to an early halt, the smaller the fund.

81. The retention is usually payable in two stages, one at the commencement of the maintenance period, as it is often called, and the other at the end. The maintenance period usually begins when the employer first takes over the project, and commences to operate or use it. Thus the work to which any particular sum which is part of the retention fund relates may have been executed a very long time before the retention fund is payable. It follows that a loss in respect of the retention fund cannot be evaluated by reference to the time when the work which gave rise to the retention fund was executed, as for instance is described at paragraph 74, supra. Entitlement to be paid the retention fund is dependent on the actual or anticipated overall position at the end of the project.

82. Retention fund provisions are very common in the construction world. The retention fund serves two roles. It is an encouragement to the contractor to remedy defects appearing before or during the maintenance period. It also provides a fund out of which the employer can reimburse itself for defects that appear before or during the maintenance period which the contractor has, for whatever reason, failed or refused to make good.

83. In the claims before this Panel, events - in the shape of Iraq's invasion and occupation of Kuwait - have intervened. The contract has effectively come to an end. There is no further scope for the operation of the retention provisions. It follows that the contractor, through the actions of Iraq, has been deprived of the opportunity to recover the money. In consequence the claims for retention fall within the jurisdiction of the Commission.

84. In the light of the above considerations it seems to this Panel that the situation in the case of claims for retention is as follows:

(a) The evidence before the Commission may show that the project was in such trouble that it would never have reached a satisfactory conclusion. In such circumstances, there can be no positive recommendation, principally because there is no direct causative link between the loss and the invasion and occupation of Kuwait.

(b) Equally the evidence may show that the project would have reached a conclusion but that there would have been problems to resolve. Accordingly, the contractor would have had to expend money resolving those problems. That potential cost would have to be deducted from the claim for retention; and accordingly the most convenient course would be to recommend an award to the contractor of a suitable percentage of the unpaid retention.

(c) Finally, on the evidence it may be the case that there is no reason to believe or conclude that the project would have gone other than satisfactorily. In those circumstances, it seems that the retention claim should succeed in full.

5. Guarantees, bonds, and like securities

85. Financial recourse agreements are part and parcel of a major construction contract. Instances are (a) guarantees - for example given by parent companies or through banks; (b) what are called "on demand" or "first demand" bonds (hereinafter "on demand bonds") which support such matters as bidding and performance; and (c) guarantees to support advance payments. (Arrangements with government sponsored bodies that provide what might be called "fall-back" insurance are in a different category. As to these, see paragraphs 95 to 102, infra).

86. Financial recourse arrangements give rise to particular problems when it comes to determining the claims filed in the population of construction and engineering claims. A convenient and stark example is that of the on demand bond.

87. The purpose of an on demand bond is to permit the beneficiary to obtain monies under the bond without having to prove default on the part of the other party - namely, in the situations under discussion here, the contractor executing the work. Such a bond is often set up by way of a guarantee given by the contractor or its parent to its own bank in its home State. That bank gives an identical bond to a bank (the second bank) in the State of the employer under the construction contract. In its turn, the second bank gives an identical bond to the employer. This leaves the employer, at least theoretically, in the very strong position of being able, without having to prove any default on the part of the contractor, to call down a large sum of money which will be debited to the contractor.

88. Of course, the contractor's bank will have two arrangements in place. First, an arrangement whereby it is secured as to the principal sum, the subject of the bond, in case the bond is called. Second, it will have arranged to exact a service charge, typically raised quarterly, half-yearly or annually.

89. Many claimants have raised claims in respect of the service charges; and also in respect of the principal sums. The former are often raised in respect of periods of years measured from the date of Iraq's invasion and occupation of Kuwait. The latter have, hitherto at least, been cautionary claims, in case the bonds are called in the future.

90. This Panel approaches this issue by observing that the strength of the position given to the employer by the on demand bond is sometimes more apparent than real. This derives from the fact that the courts of some countries are reluctant to enforce payment of such bonds if they feel that there is serious abuse by the employer of its position. For example, where there is a persuasive allegation of fraud, some courts will be prepared to injunct the beneficiary from making a call on the bond, or one or other of the banks from meeting the demand. It is also the case that there may be remedies for the contractor in some jurisdictions when the bonds are called in circumstances that are clearly outside the original contemplation of the parties.

91. The Panel notes that most if not all contracts for the execution of major construction works by a contractor from one country in the territory of another country will have clauses to deal with war, insurrection or civil disorder. Depending on the approach of the relevant governing law to such

matters, these provisions, if triggered, may have a direct or indirect effect on the validity of the bond. Direct, if under the relevant legal regime, the effects of the clause in the construction contract apply also to the bond; indirect if the termination or modification of the underlying obligation (the construction contract) gives rise to the opportunity to seek a forum-driven modification or termination of the liabilities under the bond.

92. In addition, the simple passage of time is likely to give rise to the right to treat the bond obligation as expired or unenforceable, or to seek a forum-driven resolution to the same effect. In addition, it is necessary to bear in mind the existence of the trade embargo and related measures[1]. The effect of the trade embargo and related measures was that an on demand bond in favour of an Iraqi party could not legally have been honoured after 6 August 1990. In those circumstances, it is difficult to see what benefit the issuing bank was providing in return for any service charges that it was paid once notice of the embargo had been widely disseminated. If the bank is providing no benefit, it is difficult to ascertain a juridical basis for any entitlement to receive the service charges.

93. In sum, and in the context of Iraq's invasion and occupation of Kuwait and the time which has passed since then, it seems to this Panel that it is highly unlikely that on demand bond obligations of the sort this Panel has seen in the instalments it has addressed are alive and effective.

94. If that analysis is correct, then it seems to this Panel that claims for service charges on these bonds will only be sustainable in very unusual circumstances. Equally, claims for the principal will only be sustainable where the principal has in fact been irrevocably paid out and where the beneficiary of the bond had no factual basis to make a call upon the bond.

6. Export credit guarantees

95. Arrangements with government sponsored bodies that provide what might be called "fall-back" insurance are in a different case to guarantees generally. These forms of financial recourse have names such as "credit risk guarantees". They are in effect a form of insurance, often underwritten by the government of the territory in which the contractor is based. They exist as part of the economic policy of the government in question, in order to encourage trade and commerce by its nationals abroad.

96. Such guarantees often have a requirement that the contractor must exhaust all local remedies before calling on the guarantee; or must exhaust all possible remedies before making a call.

97. Claims have been made by parties for:

1/ [1] **The expression the "trade embargo and related measures" refers to the prohibitions in Security Council resolution 661 (1990) and relevant subsequent resolutions and the measures taken by the states pursuant thereto.**

(a) reimbursement of the premia paid to obtain such guarantees; and also for

(b) shortfalls between the amounts recovered under such guarantees and the losses said to have been incurred.

In the view of this Panel, one of these types of claim is misconceived; and the other is mis-characterised.

98. A claim for the premia is misconceived. A premium paid for any form of insurance is not recoverable unless the policy is avoided. Once the policy is in place, either the event that the policy is intended to embrace occurs, or it does not. If it does, then there is a claim under the policy. If it does not then there is no such claim. In neither case does it seem to the Panel that the arrangements - prudent and sensible as they are - give rise to a claim for compensation for the premia. There is no "loss" properly so called or any causative link with Iraq's invasion and occupation of Kuwait.

99. Further, where a contractor has in fact been indemnified in whole or in part by such a body in respect of losses incurred as a result of Iraq's invasion and occupation of Kuwait, there is, to that extent, no longer any loss for which that contractor can claim to the Commission. Its loss has been made whole.

100. The second situation is that where a contractor claims for the balance between what are said to be losses incurred as a result of Iraq's invasion and occupation of Kuwait and what has been recovered from the guarantor.

101. Here the claim is mis-characterised. That balance may indeed be a claimable loss; but its claimability has nothing to do with the fact that the monies represent a shortfall between what has been recovered under the guarantee and what has been lost. Instead, the correct analysis should start from a review of the cause of the whole of the loss of which the balance is all that remains. The first step is to establish whether there is evidence to support that whole sum, that it is indeed a sum that the claimant has paid out or failed to recover; and that there is the necessary causation. To the extent that the sum is established, then to that extent the claim is prima facie compensable. However, so far as there has been reimbursement by the guarantor, the loss has been made good, and there is nothing left to claim for. It is only if there is still some qualifying loss, not made good, that there is room for a recommendation of this Panel.

102. Finally, there are the claims by the bodies granting the credit guarantees who have paid out sums of money. They entered into an insurance arrangement with the contractor. In consideration of that arrangement, they required the payment of premia. As before, either the event covered by the insurance occurred or it did not. In the former case, the Panel would have thought that the guarantor was contractually obliged to pay out; and in the latter case, not so. Whether any payments made in these circumstances give rise to a compensable claim is not a matter for this Panel. Such claims come within the population of claims allocated to the "E/F" Panel.

7. Frustration and force majeure clauses

103. Construction contracts, both in common law and under the civil law, frequently contain provisions to deal with events that have wholly changed the nature of the venture. Particular events which are addressed by such clauses include war, civil strife and insurrection. Given the length of time that a major construction project takes to come to fruition and the sometimes volatile circumstances, both political and otherwise, in which such contracts are carried out, this is hardly surprising. Indeed, it makes good sense. The clauses make provision as to how the financial consequences of the event are to be borne; and what the result is to be so far as the physical project is concerned.

104. Such clauses give rise to two questions when it comes to the population of claims before this Panel. The first question is whether Iraq is entitled to invoke such clauses to reduce its liability. The second is whether claimants may utilise such clauses to support or enhance their recovery from the Commission.

105. As to the first question, the position seems to this Panel to be as follows. In the population of claims before the Commission, the frustrating or force majeure event will nearly always be the act or omission of Iraq itself. However, such a clause is designed to address events which, if they occurred at all, were anticipated to be wholly outside the control of both parties. It would be quite inappropriate for the causal wrongdoer to rely on such clause to reduce the consequences of its own wrongdoing.

106. But the second question then arises as to whether claimants can rely upon such clauses. An example of such reliance would be where the clause provides for the acceleration of payments which otherwise would not have fallen due. As to this question, one example of this sort of claim has been addressed and the answer categorically spelt out in the first report of the "E2" Panel as follows:

> "Second, [the Claimants] direct the Commission's attention to the clauses relating to "frustration" in the respective underlying contracts. The Claimants assert that in the case of frustration of contract, these clauses accelerate the payments due under the contract, in effect giving rise to a new obligation on the part of Iraq to pay all the amounts due and owing under the contract regardless of when the underlying work was performed. The Panel has concluded that claimants may not invoke such contractual agreements or clauses before the Commission to avoid the "arising prior to" exclusion established by the Security Council in resolution 687 (1991); consequently, this argument must fail." (S/AC.26/1998/7, paragraph 188).

107. The situation described above was one where the work that was the subject of the claim had been performed prior to Iraq's invasion and occupation of Kuwait, and, therefore, fell clearly foul of the "arising prior to" rule. However, the claimants, who had agreed on arrangements for delayed payment, sought to rely on the frustration clause to get over this problem. The argument was, as this Panel understands it, that the frustration clause was triggered by the events which had in fact occurred, namely Iraq's invasion and occupation of Kuwait. The frustration clause provided for the accelerated payment of sums due under the contract. Payment of the sums had originally been deferred to dates which were still in the future at the time of the invasion and occupation; but the frustrating event

meant that they became due during the time of, or indeed at the beginning of, Iraq's invasion and occupation of Kuwait. Accordingly, the payments had, in the event, become due within the period covered by the jurisdiction established by Security Council resolution 687 (1991). Therefore, a claim for the reimbursement of these payments could be entertained by the "E2" Panel.

108. It was this claim that the "E2" Panel rejected. This Panel agrees.

109. There remains the situation where the frustration clause is being used by claimants to enhance a claim, other than by way of circumventing the "arising prior to" rule, for example, where the acceleration delivered by the frustration clause is put forward to seek to bring into the period within the jurisdiction of the Commission payments which would otherwise have been received, under the contract, well after the liberation of Kuwait, and therefore would not otherwise be compensable.

110. In the view of this Panel, such claims would similarly fail. In this case, as in the case addressed by the "E2" Panel, claimants are seeking to use the provisions of private contracts to enhance the jurisdiction granted by Security Council resolution 687 (1991) and defined by jurisprudence developed by the Commission. That is not an appropriate course. It is not open to individual entities by agreement or otherwise, to modify the jurisdiction of the Commission.

J. Claims for overhead and "lost profits"

1. General

111. Any construction project can be broken down into a number of components. All of these components contribute to the pricing of the works. In this Panel's view, it is helpful for the examination of these kinds of claims to begin by rehearsing in general terms the way in which many contractors in different parts of the world construct the prices that ultimately appear in the construction contracts they sign. Of course, there is no absolute rule as to this process. Indeed, it is unlikely that any two contractors will assemble their bids in exactly the same way. But the constraints of construction work and the realities of the financial world impose a general outline from which there will rarely be a substantial deviation.

112. Many of the construction contracts encountered in the claims submitted to this Panel contain a schedule of rates or a "bill of quantities". This document defines the amount to be paid to the contractor for the work performed. It is based on previously agreed rates or prices. The final contract price is the aggregate value of the work calculated at the quoted rates together with any variations and other contractual entitlements and deductions which increase or decrease the amount originally agreed.

113. Other contracts in the claims submitted to this Panel are lump sum contracts. Here the schedule of rates or bill of quantities has a narrower role. It is limited to such matters as the calculation of the sums to be paid in interim certificates and the valuation of variations.

114. In preparing the schedule of rates, the contractor will plan to recover all of the direct and indirect costs of the project. On top of this will be an allowance for the "risk margin". In so far as

there is an allowance for profit it will be part of the "risk margin". However, whether or not a profit is made and, if made, in what amount, depends obviously on the incidence of risk actually incurred.

115. An examination of actual contracts combined with its own experience of these matters has provided this Panel with guidelines as to the typical breakdown of prices that may be anticipated on construction projects of the kind relevant to the claims submitted to this Panel.

116. The key starting point is the base cost - the cost of labour, materials and plant – in French the "prix secs". In another phrase, this is the direct cost. The direct cost may vary, but usually represents 65 to 75 per cent of the total contract price.

117. To this is added the indirect cost - for example the supply of design services for such matters as working drawings and temporary works by the contractor's head office. Typically, this indirect cost represents about 25 to 30 per cent of the total contract price.

118. Finally, there is what is called the "risk margin" - the allowance for the unexpected. The risk margin is generally in the range of between barely above zero and five per cent of the total contract price. The more smoothly the project goes, the less the margin will have to be expended. The result will be enhanced profits, properly so called, recovered by the contractor at the end of the day. The more the unexpected happens and the more the risk margin has to be expended, the smaller the profit will ultimately be. Indeed, the cost of dealing with the unexpected or the unplanned may equal or exceed the risk margin, leading to a nil result or a loss.

119. In the view of the Panel, it is against this background that some of the claims for contract losses need to be seen.

2. Head office and branch office expenses

120. These are generally regarded as part of the overhead. These costs can be dealt with in the price in a variety of ways. For example, they may be built into some or all of the prices against line items; they may be provided for in a lump sum; they may be dealt with in many other ways. One aspect, however, will be common to most, if not all, contracts. It will be the intention of the contractor to recover these costs through the price at some stage of the execution of the contract. Often the recovery has been spread through elements of the price, so as to result in repayment through a number of interim payments during the course of the contract. Where this has been done, it may be said that these costs have been amortised. This factor is relevant to the question of double-counting (see paragraph 123, infra).

121. If therefore any part of the price of the works has been paid, it is likely that some part of these expenses has been recovered. Indeed, if these costs have been built into items which are paid early, a substantial part or even all of these costs may have been recovered.

122. If these items were the subject of an advance payment, again they may have been recovered in their entirety at an early stage of the project. Here of course there is an additional complication, since the advance payments will be credited back to the employer - see paragraph 66, supra - during the

course of the work. In this event, the Panel is thrown back onto the question of where in the contractor's prices payment for these items was intended to be.

123. In all of these situations, it is necessary to avoid double-counting. By this the Panel means the situation where the contractor is specifically claiming, as a separate item, elements of overhead which, in whole or in part, are already covered by the payments made or claims raised for work done.

124. The same applies where there are physical losses at a branch or indeed a site office or camp. These losses are properly characterised, and therefore claimable, if claimable at all, as losses of tangible assets.

3. Loss of profits on a particular project

125. Governing Council decision 9, paragraph 9, provides that where "continuation of the contract became impossible for the other party as a result of Iraq's invasion and occupation of Kuwait, Iraq is liable for any direct loss the other party suffered as a result, including lost profits".

126. As will be seen from the observations at paragraphs 111 to 119, supra, the expression "lost profits" is an encapsulation of quite a complicated concept. In particular, it will be appreciated that achieving profits or suffering a loss is a function of the risk margin and the actual event.

127. The qualification of "margin" by "risk" is an important one in the context of construction contracts. These contracts run for a considerable period of time; they often take place in remote areas or in countries where the environment is hostile in one way or another; and of course they are subject to political problems in a variety of places - where the work is done, where materials, equipment or labour have to be procured, and along supply routes. The surrounding circumstances are thus very different and generally more risk prone than is the case in the context of, say, a contract for the sale of goods.

128. In the view of this Panel it is important to have these considerations in mind when reviewing a claim for lost profits on a major construction project. In effect one must review the particular project for what might be called its "loss possibility". The contractor will have assumed risks. He will have provided a margin to cover these risks. He will have to demonstrate a substantial likelihood that the risks would not occur or would be overcome within the risk element so as to leave a margin for actual profit.

129. This approach, in the view of this Panel, is inherent in the thinking behind paragraph 5 of Governing Council decision 15. This paragraph expressly states that a claimant seeking compensation for business losses such as loss of profits, must provide "detailed factual descriptions of the circumstances of the claimed loss, damage or injury" in order for compensation to be awarded.

130. In the light of the above analysis, and in conformity with the two Governing Council decisions cited above, this Panel requires the following from those construction and engineering claimants that seek to recover for lost profits. First, the phrase "continuation of the contract" imposes a requirement on the claimant to prove that it had an existing contractual relationship at the time of the invasion.

Second, the provision requires the claimant to prove that the continuation of the relationship was rendered impossible by Iraq's invasion and occupation of Kuwait. This provision indicates a further requirement that profits should be measured over the life of the contract. It is not sufficient to prove that there would have been a "profit" at some stage before the completion of the project. Such a proof would only amount to a demonstration of a temporary credit balance. This can even be achieved in the early stages of a contract, for example where the pricing has been "front-loaded" for the express purpose of financing the project.

131. Instead, the claimant must lodge sufficient and appropriate evidence to show that the contract would have been profitable as a whole. Such evidence would include projected and actual financial information relating to the relevant project, such as audited financial statements, budgets, management accounts, turnover, original bids and tender sum analyses, time schedules drawn up at the commencement of the works, profit/loss statements, finance costs and head office costs prepared by or on behalf of the claimant for each accounting period from the first year of the relevant project to March 1993. The claimant should also provide: original calculations of profit relating to the project and all revisions to these calculations made during the course of the project; management reports on actual financial performance as compared to budgets that were prepared during the course of the project; evidence demonstrating that the project proceeded as planned, such as monthly/periodic reports, planned/actual time schedules, interim certificates or account invoices, details of work that was completed but not invoiced by the claimant, details of payments made by the employer and evidence of retention amounts that were recovered by the claimant. In addition, the claimant should provide evidence of the percentage of the works completed at the time work on the project ceased.

4. Loss of profits for future projects

132. Some claimants say they would have earned profits on future projects, not let at the time of Iraq's invasion and occupation of Kuwait. Such claims are of course subject to the sorts of considerations set out by this Panel in its review of claims for lost profits on individual projects. In addition, it is necessary for such a claimant to overcome the problem of remoteness. How can a claimant be certain that it would have won the opportunity to carry out the projects in question? If there was to be competitive tendering, the problem is all the harder. If there was not to be competitive tendering, what is the basis of the assertion that the contract would have come to the claimant?

133. Accordingly, in the view of this Panel, for such a claim to warrant a recommendation, it is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (i.e., profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded. Among other matters, it will be necessary to establish a picture of the assets that were being employed so that the extent to which those assets would continue to be productive in the future can be determined. Balance sheets for previous years will have to be produced, along with relevant strategy statements or like documents which were in fact utilised in the past. The current strategy statement will also have to be provided. In all cases, this Panel will be looking for contemporaneous documents rather than ones that

have been formulated for the purpose of the claim; although the latter may have a useful explanatory or demonstrational role.

134. Such evidence is often difficult to obtain; and accordingly in construction cases such claims will only rarely be successful. And even where there is such evidence, the Panel is likely to be unwilling to extend the projected profitability too far into the future. The political exigencies of work in a troubled part of the world are too great to justify looking many years ahead.

K. Loss of monies left in Iraq

1. Funds in bank accounts in Iraq

135. Numerous claimants seek to recover compensation for funds on deposit in Iraqi banks. Such funds were of course in Iraqi dinars and were subject to exchange controls.

136. The first problem with these claims is that it is often not clear that there will be no opportunity in the future for the claimant to have access to and to use such funds. Indeed, many claimants, in their responses to interrogatories or otherwise have modified their original claims to remove such elements, as a result of obtaining access to such funds after the initial filing of their claim with the Commission.

137. Second, for such a claim to succeed it would be necessary to establish that in the particular case, Iraq would have permitted the exchange of such funds into hard currency for the purposes of export. For this, appropriate evidence of an obligation to this effect on the part of Iraq is required. Furthermore, this Panel notes that the decision to deposit funds in banks located in particular countries is a commercial decision, which a corporation engaged in international operations is required to make. In making this decision, a corporation would normally take into account the relevant country or regional risks involved.

138. This Panel, in analysing the claims presented to it to date concludes that, in most cases, it will be necessary for a claimant to demonstrate (in addition to such matters as loss and quantum) that:

(a) the relevant Iraqi entity was under a contractual or other specific duty to exchange those funds for convertible currencies;

(b) Iraq would have permitted the transfer of the converted funds out of Iraq; and

(c) this exchange and transfer was prevented by Iraq's invasion and occupation of Kuwait.

139. Absent proof of these aspects of the matter, it is difficult to see how the claimant can be said to have suffered any "loss". If there is no loss, this Panel is unable to recommend compensation.

2. Petty cash

140. Exactly the same considerations apply to claims for petty cash left in Iraq in Iraqi dinars. These monies were left in the offices of claimants when they departed from Iraq. The circumstances in which the money was left behind vary somewhat; and the situation which thereafter obtained also varies - some claimants contending that they returned to Iraq but the monies were gone; and others

being unable to return to Iraq and establish the position. In these different cases, the principle seems to this Panel to be the same. Claimants in Iraq needed to have available sums (which could be substantial) to meet liabilities which had to be discharged in cash. These sums necessarily consisted of Iraqi dinars. Accordingly, absent evidence of the same matters as are set out in paragraph 138, supra, it will be difficult to establish a "loss", and in those circumstances, this Panel is unable to recommend compensation.

3. Customs deposits

141. In this Panel's understanding, these sums are paid, nominally at least, as a fee for permission to effect a temporary importation of plant, vehicles or equipment. The recovery of these deposits is dependent on obtaining permission to export the relevant plant, vehicles and equipment.

142. The Panel further understands that such permission was hard to obtain in Iraq prior to Iraq's invasion and occupation of Kuwait. Accordingly, although defined as a temporary exaction, it was often permanent in fact, and no doubt contractors experienced in the subtleties of working in Iraq made suitable allowances. And no doubt they were able to, or expected to, recover these exactions through payment for work done. Once the invasion and occupation of Kuwait had occurred, obtaining such permission to export became appreciably harder. Indeed, given the trade embargo, a necessary element would have been the specific approval of the Security Council.

143. In the light of the foregoing, it seems to the Panel that claims to recover these duties need to be supported by sufficient evidentiary material, going to the issue of whether, but for Iraq's invasion and occupation of Kuwait, such permission would, in fact or on a balance of probabilities, have been forthcoming.

144. Absent such evidence and leaving aside any question of double-counting, (see paragraph 123, supra), the Panel is unlikely to be able to make any positive recommendations for compensating unrecovered customs deposits made for plant, vehicles and equipment used at construction projects in Iraq.

L. Tangible property

145. With reference to losses of tangible property located in Iraq, decision 9 provides that where direct losses were suffered as a result of Iraq's invasion and occupation of Kuwait with respect to tangible assets, Iraq is liable for compensation (decision 9, paragraph 12). Typical actions of this kind would have been the expropriation, removal, theft or destruction of particular items of property by Iraqi authorities. Whether the taking of property was lawful or not is not relevant for Iraq's liability if it did not provide for compensation. Decision 9 furthermore provides that in a case where business property had been lost because it had been left unguarded by company personnel departing due to the situation in Iraq and Kuwait, such loss may be considered as resulting directly from Iraq's invasion and occupation (decision 9, paragraph 13).

146. Many of the construction and engineering claims that come before this Panel are for assets that were confiscated by the Iraqi authorities in 1992 or 1993. Here the problem is one of causation. By

the time of the event, Iraq's invasion and occupation of Kuwait was over. Liberation was a year or more earlier. Numerous claimants had managed to obtain access to their sites to establish the position that obtained at that stage. In the cases the subject of this paragraph, the assets still existed. However, that initially satisfactory position was then overtaken by a general confiscation of assets by Iraqi authorities. While it sometimes seems to have been the case that this confiscation was triggered by an event which could be directly related to Iraq's invasion and occupation of Kuwait, in the vast majority of the claims that this Panel has seen, this was not the case. It was simply the result of a decision on the part of the authorities to take over these assets. This Panel has difficulty in seeing how these losses were caused by Iraq's invasion and occupation of Kuwait. On the contrary, it appears that they stem from an wholly independent event and accordingly are outside the jurisdiction of the Commission.

M. Payment or relief to others

147. Paragraph 21(b) of decision 7 specifically provides that losses suffered as a result of "the departure of persons from or their inability to leave Iraq or Kuwait" are to be considered the direct result of Iraq's invasion and occupation of Kuwait. Consistent with decision 7, therefore, the Panel finds that evacuation and relief costs incurred in assisting employees in departing from Iraq are compensable to the extent proven.

148. Paragraph 22 of Governing Council decision 7 provides that "payments are available to reimburse payments made or relief provided by corporations or other entities to others - for example, to employees, or to others pursuant to contractual obligations - for losses covered by any of the criteria adopted by the Council".

149. In the Fourth Report, this Panel found that the costs associated with evacuating and repatriating employees between 2 August 1990 and 2 March 1991 are compensable to the extent that such costs are proven by the claimant and are reasonable in the circumstances. Urgent temporary liabilities and extraordinary expenses relating to evacuation and repatriation, including transportation, food and accommodation, are in principle, compensable.

150. Many claimants do not provide a documentary trail detailing to perfection the expenses incurred in caring for their personnel and transporting them (and, in some instances, the employees of other companies who were stranded) out of a theatre of hostilities.

151. In these cases this Panel considers it appropriate to accept a level of documentation consistent with the practical realities of a difficult, uncertain and often hurried situation, taking into account the concerns necessarily involved. The loss sustained by claimants in these situations is the very essence of the direct loss suffered which is stipulated by Security Council resolution 687 (1991). Accordingly, the Panel uses its best judgement, after considering all relevant reports and the material at its disposal, to arrive at an appropriate recommendation for compensation.

N. Final awards, judgments and settlements

152. In the case of some of the projects in which claimants are seeking compensation from the Commission, there have been proceedings between the parties to the project contract leading to an

award or a judgment; or there has been a settlement between the claimant and another party to the relevant contract. In all such cases, one is concerned with finality. The award, judgment or settlement must be final – not subject to appeal or revision.

153. The claim that is then raised with the Commission is either for sums said not to have been included in the award or judgment or for sums said not to have been included in the settlement.

154. It follows that it will be a prerequisite to establish that that is in fact the case, namely that, for some reason, the claim resulting in the award, judgment or settlement did not raise or resolve the subject matter of the claim being put before the Commission. Sufficient evidence of this will be needed. The absence of an identifiable element in the award, judgment or settlement relating to the claim before the Commission does not necessarily mean that that it has not been addressed. The Tribunal that issued the award or judgment or the parties that concluded the settlement may have reached a single sum to cover a number of claims, including the claim in question; or the Tribunal may have considered that the claim was not maintainable. Equally, the claim may have been abandoned in, and as part of, the settlement. In such an event it would appear that the claim has been resolved and there is no loss left to be compensated. At that stage, it will be necessary to review the file to see if there is any special circumstance or material that would displace this initial conclusion. Absent such circumstance or material, no loss has been established. Sufficient evidence of an existing loss is essential if this Panel is to recommend compensation.

155. If, on the other hand, it is clear that the particular claim has not been adjudicated or settled, then it may be entertained by the Commission.